

INTERNET
FORM NLRB-601
(2-08)UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
CHARGE AGAINST EMPLOYER

DO NOT WRITE IN THIS SPACE

Case

16-CA-170669

Date Filed

2-25-2016

INSTRUCTIONS:

File an original with NLRB Regional Director for the region in which the alleged unfair labor practice occurred or is occurring.

1. EMPLOYER AGAINST WHOM CHARGE IS BROUGHT

a. Name of Employer

LTTS Charter School, Inc. d/b/a Universal Academy

b. Tel. No. (817) 201-0584

c. Cell No.

f. Fax No.

d. Address (Street, city, state, and ZIP code)

2616 N. MacArthur Boulevard
Irving, Texas 75230

e. Employer Representative

Thomas Fuller

The Fuller Law Group, PLLC
2000 E. Lamar Boulevard, Suite 600
Arlington, Texas 76006

g. e-Mail

h. Number of workers employed

i. Type of Establishment (factory, mine, wholesaler, etc.)

Charter school

j. Identify principal product or service

Education

k. The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8(a), subsections (1) and (list subsections) of the National Labor Relations Act, and these unfair labor practices are practices affecting commerce within the meaning of the Act, or these unfair labor practices are unfair practices affecting commerce within the meaning of the Act and the Postal Reorganization Act.

2. Basis of the Charge (set forth a clear and concise statement of the facts constituting the alleged unfair labor practices)

Since January 2016, and continuing thereafter, the Employer discriminated against Employee, Kimberly Free, by threatening her with discipline and terminating her in retaliation for and/or in order to discourage protected concerted activity.

Since August 2015, and continuing thereafter, the Employer promulgated orally and/or in writing unlawful rules by telling employees that they could not discuss wages or working conditions, could not fraternize with other employees outside of working hours, and could not contact former employees for any reason.

3. Full name of party filing charge (If labor organization, give full name, including local name and number)

Kimberly Free

4a. Address (Street and number, city, state, and ZIP code)

10710 N. MacArthur Boulevard #169
Irving, Texas 75063

4b. Tel. No. (972) 273-0392

4c. Cell No.

4d. Fax No.

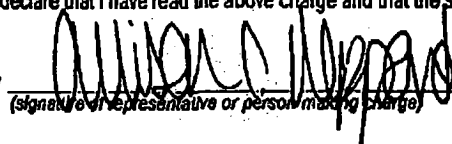
4e. e-Mail

5. Full name of national or international labor organization of which it is an affiliate or constituent unit (to be filled in when charge is filed by a labor organization)

6. DECLARATION

I declare that I have read the above charge and that the statements are true to the best of my knowledge and belief.

By



Allison C. Reppond, Trial Attorney

(Print/Type name and title or office, if any)

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02/25/2016

(date)

WILLFUL FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 et seq. The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing unfair labor practice and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is voluntary; however, failure to supply the information will cause the NLRB to decline to invoke its processes.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 16

LTTS CHARTER SCHOOL, INC.,
d/b/a UNIVERSAL ACADEMY

and

Case 06-CA-170669

KIMBERLY FREE, an Individual

**RESPONDENT LTTS CHARTER SCHOOL,
INC. D/B/A UNIVERSAL ACADEMY'S OBJECTION
TO JURISDICTION, PLEA TO THE JURISDICTION,
AND, SUBJECT THERETO, ORIGINAL ANSWER**

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COUNSEL FOR RESPONDENT

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TO THE HONORABLE NATIONAL LABOR RELATIONS BOARD:

RESPONDENT LTTS Charter School, Inc. d/b/a Universal Academy (“Universal Academy”) files this, its Objection to Jurisdiction, Plea to the Jurisdiction, and, Subject Thereto, Original Answer, and in support hereof show as follows:

I. OBJECTION TO JURISDICTION AND PLEA TO THE JURISDICTION

As a Texas open-enrollment public charter school, Respondent Universal Academy objects to the jurisdiction asserted by the National Labor Relations Board over this matter and urges the Board to dismiss this Complaint. The Board does not have jurisdiction over this Texas open-enrollment public charter school, which is a political subdivision under the National Labor Relations Act and thus exempted from the definition of an “employer” over whom the NLRB has jurisdiction.

STATEMENT OF FACTS

Kimberly Free, a former teacher at Universal Academy, filed a charge with the National Labor Relations Board alleging Universal Academy discriminated against her by threatening her with discipline and terminating her for engaging in protected concerted activity. While Universal Academy vigorously denies the merits of these allegations (Ms. Free voluntarily resigned, tendering a hand-written and signed letter of resignation, and Ms. Free was not involved in any protected concerted activity), it is first and foremost important for Universal Academy to object to the Board’s assertion of jurisdiction to hear this matter.

Universal Academy is a Texas non-profit corporation operating a Texas open-enrollment public charter school with two campuses in the greater Dallas area. Universal Academy was granted a Contract for Charter on May 18, 1998 by the Texas State Board of Education, and its charter has subsequently been renewed through July 31, 2022. At all times relevant to this case, Universal Academy has held a valid and active Contract for Charter with the Texas State Board of Education.

SUMMARY OF THE ARGUMENT

Texas open-enrollment charter schools, such as Universal Academy, are political subdivisions under the National Labor Relations Act. Texas open-enrollment charter schools are administered by individuals who are responsible to the Texas Commissioner of Education and the State Board of Education. The responsibility is real. These charter schools are held strictly accountable for both their academic and financial performance and are rated on both each year. The Texas Education Code grants the Texas Commissioner of Education the authority to remove and appoint board members of the governing body of a Texas open-enrollment charter school when requisite standards are not met, and to audit them as the Commissioner deems necessary.¹

Moreover, Texas open-enrollment charter schools are considered “public schools” in Texas, and the Texas Supreme Court has found them to be “an institution, agency, or organ of government,” the status and authority of which are

¹ See TEX. ED. CODE, §§ 12.115 and 12.116.

derived from the Constitution of Texas or from laws passed by the legislature under the Constitution.² As such, Universal Academy fits squarely within the definition of a “political subdivision” that is excepted from the jurisdiction of the NLRB.

ARGUMENT

A. The “Political Subdivision” Exception from the National Labor Relations Act.

1. The Board’s Jurisdiction.

In 1935, the United States Congress passed the National Labor Relations Act. The employment protections of the Act extend only to workers qualifying as “employees” under the Act, which in turn is limited to those individuals who are employed by an entity meeting the NLRA’s definition of “employer.”³ Excepted from the definition of “employer” under the NLRA is “any State or political subdivision thereof.”⁴ The National Labor Relations Board is charged with enforcement of the NLRA, but its jurisdiction for enforcement extends only to those employees and employers covered by the Act. Its jurisdiction does not extend to the “political subdivisions of a State.”⁵

2. How a “Political Subdivision” is Defined.

² See *LTTs Charter School, Inc. v. C2 Construction, Inc.*, 342 S.W.3d 73, 77-78 (Tex. 2011).

³ See generally, 29 U.S.C.A. § 152.

⁴ *Id.*

⁵ See *NLRB v. Nat. Gas Util. Dist. of Hawkins Cty., Tenn.*, 402 U.S. 600, 602-03, 91 S.Ct. 1746, 29 L.Ed.2d 206 (1971).

The NLRA does not provide a definition of a “political subdivision.”⁶ In the case of *NLRB v. Nat. Gas Util. Dist. of Hawkins Cty., Tenn.*, the Supreme Court considered and approved of a test used by the Board to determine whether an entity was a “political subdivision” of a state, where an entity was considered to be a political subdivision if it was:

- (1) created directly by the state, so as to constitute departments or administrative arms of the government, or
- (2) administered by individuals who are responsible to public officials or to the general electorate.⁷

In that case, the Court noted:

[T]he Board test is not whether the entity is administered by ‘State-appointed or elected officials.’ Rather, alternative (2) of the test is whether the entity is ‘administered *by individuals who are responsible to public officials* or to the general electorate.’⁸

Around seven months after the Supreme Court’s decision in *Hawkins County*, the Secretary of Labor promulgated 29 C.F.R. § 1975.5, providing a formal definition and test for determining a “political subdivision”:⁹

Tests. Any entity which has been (1) created directly by the State, so as to constitute a department or administrative arm of the government, or (2) administered by individuals who are controlled by public officials and responsible to such officials or to the general electorate, shall be deemed to be a ‘State or political subdivision thereof’ ... and, therefore, not

⁶ See 29 U.S.C.A. § 152.

⁷ *Hawkins County*, 402 U.S., at 604.

⁸ *Id.* (emphasis in original).

⁹ While this regulation pertained to OSHA, this definition of “political subdivision” has been applied equally to analysis of all entities claiming political subdivision status under the NLRA.

within the definition of employer, and, consequently, not subject to the Act as an employer.¹⁰

The Board continues to use this definition.¹¹ This test has been confirmed by the federal circuit courts of appeal as being identical to the test considered by the Supreme Court in *Hawkins County*.¹²

3. The Holding in *StarTran*.

In *StarTran, Inc. v. Occupational Safety and Health Review Commission*, the Fifth Circuit reviewed the Occupational Safety and Health Review Commission's determination that StarTran, Inc. was not a political subdivision.¹³ StarTran was a non-profit corporation created to assist Capital Metro, an Austin, Texas transportation authority, with employment issues.¹⁴ The Occupational Safety and Health Review Commission sought to enforce a citation against StarTran for an alleged violation.¹⁵ The Commission asserted jurisdiction over StarTran by determining StarTran was not a political subdivision exempt from OSHA coverage.¹⁶ StarTran challenged this assertion of jurisdiction.

¹⁰ 29 C.F.R. § 1975.5(b).

¹¹ See *StarTran, Inc. v. Occupational Safety and Health Review Com'n.*, 608 F.3d 312, 314 (5th Cir. 2010).

¹² See *StarTran*, 608 F.3d, at 315; see also *Brock v. Chicago Zoological Soc.*, 820 F.3d 909 (7th Cir. 1987).

¹³ See *StarTran*, 608 F.3d, at 315.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

The issue in the case boiled down to the Commission's assertion that StarTran's board was not *controlled* by a political official.¹⁷ The board members were appointed by Capital Metro, an undisputed political subdivision, and were removable by Capital Metro.¹⁸ However, the Commission found that StarTran controlled the day-to-day working conditions of its employees and concluded that Capital Metro did not "control" StarTran's daily activities.¹⁹ This was the ultimate basis for the Commission's determination that StarTran was not an exempt political subdivision.²⁰

The Fifth Circuit disagreed with the Commission and reversed the Commission's decision and remanded the case for dismissal of the citation for lack of jurisdiction.²¹ The Court concluded that the *control test* is not whether the political official (to whom the entity is responsible) controls daily activities or operations, but rather whether that political official has the *ability* to control the board by removing or appointing board members.²²

The matters of "control of day to day working conditions of employees" or "day-to-day control of employees," or the equivalent thereof, are not mentioned anywhere in section 1975.5... To allow the Secretary to add, on an ad hoc individual case by case basis, controlling requirements for meeting the political subdivision test of section 1975(b)(2) that are nowhere mentioned in section 1975.5, is to in effect render the regulation meaningless, and essentially say that a political subdivision is

¹⁷ *Id.*, at 320-21.

¹⁸ *Id.*

¹⁹ *Id.*, at 322-23.

²⁰ *Id.*

²¹ *Id.*, at 324-25

²² *Id.*

whatever the Secretary thinks it is in each or any particular case. That is simply not reasonable.²³

The Fifth Circuit also declared it was unaware of any court decision holding an entity whose board was subject to appointment and removal by one or more public officials to be anything other than a “political subdivision.”²⁴

The cases in this area have generally held that if a majority of the board of directors of the claimed political subdivision is *not* subject to selection or removal by public officials or the general electorate, then the entity *for that reason* fails the second alternative test for being a political subdivision under section 152(2).²⁵

Thus, as interpreted by the Supreme Court and the Fifth Circuit, if a non-profit corporation is administered by individuals who are responsible to a public official and the public official retains the right and ability to remove and/or appoint board members of that entity, the entity will be considered a “political subdivision” that is exempted from the NLRB’s jurisdiction.

In determining whether an entity created under state law is a political subdivision under the NLRA, federal law, rather than state law, governs the determination.²⁶ However, state law declarations and interpretations, though not necessarily controlling, are given careful consideration.²⁷ The Supreme Court has

²³ *Id.*

²⁴ *Id.* at 324.

²⁵ *Id.*, at 323 (emphasis in original).

²⁶ See *Hawkins Cty.*, 402 U.S., at 602-03.

²⁷ *Id.*

acknowledged that in many cases, the application of federal law may depend on state law.²⁸

In this case, the controlling test of whether a Texas open-enrollment charter school is a political subdivision exempted from the NLRA will be whether the entity is “administered by individuals who are responsible to public officials.”²⁹ To make this determination, the Fifth Circuit instructs the NLRB to use a control test to determine whether the public official to whom the governing body reports retains a right and ability to remove and/or appoint board members of that entity.³⁰ If so, the entity is a political subdivision exempt from the NLRA.³¹

B. Texas Open-Enrollment Charter Schools are “Political Subdivisions,” and thus Exempt from the National Labor Relations Act.

1. Texas Open-Enrollment Charter Schools are “Administered by Individuals Who are Responsible to Public Officials.”

a. Texas Open-Enrollment Charter Schools.

The Texas Constitution mandates that the Texas Legislature create a public school system:

A general diffusion of knowledge being essential to the preservation of liberties and rights of the people, it shall be the duty of the Legislature of the State to establish and make suitable provision for the support and maintenance of an efficient system of public free schools.”³²

²⁸ *Id.*, at 603.

²⁹ *Id.*, at 604-605.

³⁰ *StarTran*, 608 F.3d, at 322.

³¹ *Id.*

³² TEX. CONST. art. VII, § 1.

The Texas Legislature, in obedience to this constitutional mandate, created a public school system.³³ The public school system created by the Texas Legislature has long been considered a division or department of the government.³⁴ In stressing the importance of the role of the public school system in Texas, the Texas Supreme Court has pointed out the Texas Constitution's link between free public education and the preservation of the liberties and rights of the citizens of this state.³⁵

The Texas Constitution gives the Texas Legislature sole authority to set the policies and fashion the means for providing a public school system.³⁶ The discretion given to the Texas Legislature to implement the public school system in this state is broad and of considerable latitude.³⁷ The Texas Constitution does not dictate a particular structure for the system of free public schools.³⁸ It is the Texas Legislature's province to "decide whether the regime should be administered by a state agency, by the districts themselves, or by any other means."³⁹

From the days of the Texas Republic up until the mid-1990s, the Texas Legislature implemented its constitutional mandate of providing free public education

³³ *Mumme v. Marrs*, 40 S.W.2d 31, 34 (Tex. 1931).

³⁴ *Id.*, at 35.

³⁵ *Neeley v. West Orange-Cove Consol. I.S.D.*, 176 S.W.3d 746, 785 (Tex. 2005).

³⁶ *West Orange-Cove Consol. I.S.D. v. Alanis*, 107 S.W.3d 558, 563 (Tex. 2003).

³⁷ *Id.*

³⁸ *Neeley*, 176 S.W.3d, at 783.

³⁹ *Alanis*, 107 S.W.3d, at 571.

through school districts.⁴⁰ In 1993, the 73rd Texas Legislature enacted Senate Bill 7, abolishing the Texas Central Education Agency over the next two years and repealing Titles 1 (General Provisions) and 2 (Public Education) of the Texas Education Code, excepting out only certain school finance chapters.⁴¹ To effect this broad overhaul of the Texas public school system, Senate Bill 7 appointed a Joint Select Committee to focus on the *delivery* of educational programs and services in the public school system.⁴² The Joint Select Committee issued a Final Report in December of 1994 recommending, among other things, that the 74th Texas Legislature consider charter schools “as a means to enhance public school choice.”⁴³

In 1995, the 74th Texas Legislature created Texas open-enrollment charter schools as public schools that offer alternatives to the public school district system, foster educational competition, and offer parents alternatives in choice of public schools.⁴⁴ The Texas Education Code describes open-enrollment charter schools as a “part of the public school system of this state.”⁴⁵ State-approved open-enrollment charter schools may be granted to non-profit organizations, institutions of higher

⁴⁰ See *San Antonio I.S.D. v. McKinney*, 936 S.W.2d 279, 282 (Tex. 1996).

⁴¹ See Act of May 28, 1993, 73rd Leg., R.S., ch. 347, §§ 8.33 and 8.35, 1993 Tex. Gen. Laws 1479, 1556.

⁴² See JOINT SELECT COMM. TO REVIEW THE CENTRAL EDUC. AGENCY, FINAL REPORT TO THE 74TH LEGISLATURE, p. 1, Tex. S.B. 7 (1994).

⁴³ See *Id.*, at p. 25.

⁴⁴ See TEX. ED. CODE, § 12.001.

⁴⁵ TEX. ED. CODE, § 12.105.

education, or other governmental entities.⁴⁶ These organizations submit an application to the Texas Education Agency pursuant to criteria set forth by the Commissioner of the Board of Education, and, if approved, are granted a charter.⁴⁷

b. These Public Schools are State Funded.

Texas open-enrollment charter schools are funded with public monies and are generally required to follow most of the same administrative, fiscal and legal requirements as traditional school districts.⁴⁸ These schools do not charge tuition.⁴⁹ Their state funding is comprised of per pupil allotments, similar to that paid to public independent school districts.⁵⁰ The funds received by a charter school from the State of Texas “are considered to be public funds for all purposes under state law.”⁵¹ They are held in trust by the charter school for the benefit of its students.⁵² Any property purchased or leased with these public funds is deemed to be public property for all purposes.⁵³

c. These Public Schools Perform the Purely Governmental Function of Providing Free Public Education Pursuant to Constitutional Mandate and the Texas Legislature’s Scheme for Free Public Education.

⁴⁶ See TEX. ED. CODE, § 12.101 (a).

⁴⁷ See TEX. ED. CODE, §§ 12.110 and 12.1101.

⁴⁸ See *gen.*, TEX. ED. CODE, §§ 12.101 - 12.133.

⁴⁹ See TEX. ED. CODE, § 12.108.

⁵⁰ See *Id.*

⁵¹ TEX. ED. CODE, § 12.107.

⁵² TEX. ED. CODE § 12.107(a)(2).

⁵³ See TEX. ED. CODE § 12.128(a)(1).

Texas open-enrollment charter schools perform the purely governmental function of implementing the state's constitutionally mandated system of providing free public education.⁵⁴ The Legislature put charter schools on equal footing with school districts in their responsibility for executing the constitutional mandate for provision of free public schools:

The school districts and charter schools created in accordance with the laws of this state have the primary responsibility for implementing the state's system of public education and ensuring student performance in accordance with this code.⁵⁵

and

An education function not specifically delegated to the [Texas Education Agency] or the [State Board of Education] under this [Education] code is reserved to and shall be performed by school districts or open-enrollment charter schools.⁵⁶

In Texas, the provision of public education is deemed to be a purely governmental function.⁵⁷ In *Braun v. Trustees of Victoria I.S.D.*, even the planting of a tree on school grounds was deemed to be a governmental act.⁵⁸ In fact, it does not appear that a court of this state has ever held any act of a public school to be proprietary.⁵⁹

⁵⁴ See TEX. ED. CODE § 12.105; see also *LTTS Charter School, Inc.*, 342 S.W.3d, at 77-78.

⁵⁵ TEX. ED. CODE §11.002.

⁵⁶ TEX. ED. CODE § 7.003.

⁵⁷ *Stout v. Grand Prairie Independent School Dist.*, 733 S.W.2d, at 296; *Braun v. Trustees of Victoria I.S.D.*, 114 S.W.2d 947, 949-50 (Tex.Civ.App.—San Antonio 1938, writ ref'd.).

⁵⁸ *Braun*, 114 S.W.2d, at 949-50.

⁵⁹ See *Fowler v. Tyler I.S.D.*, 232 S.W.3d 335, 339 (Tex. App.—Tyler 2007, pet. denied).

Texas open-enrollment charter schools are treated as public bodies under Texas law. They are subject to the open records and open government requirements of the Texas Government Code to the same extent as any other state administrative branch.⁶⁰ They participate in the Texas Teacher Retirement System to the same extent as school districts.⁶¹ They have immunity from lawsuits to the same extent as school districts and other political subdivisions, and their employees have immunity to the same extent as their school district counterparts.⁶² They are governed by statutes which apply, by their terms, to political subdivisions of Texas for all purchasing and contracting,⁶³ group health, dental and disability benefits for political subdivisions,⁶⁴ and workers' compensation benefits for political subdivisions.⁶⁵ The members of the governing body of a Texas open-enrollment charter school are considered public officials who must comply with the conflict of interest and nepotism requirements under Texas law for public officials.⁶⁶ Texas open-enrollment charter schools have been deemed political subdivisions who are subject to the Texas Whistleblower Protection Act.⁶⁷

⁶⁰ TEX. ED. CODE, §§ 12.1051 and 12.1052.

⁶¹ TEX. ED. CODE, § 12.1057.

⁶² TEX. ED. CODE § 12.1056.

⁶³ TEX. ED. CODE § 12.1053.

⁶⁴ TEX. ED. CODE § 12.1058.

⁶⁵ TEX. ED. CODE § 12.1058.

⁶⁶ TEX. ED. CODE § 12.1054.

⁶⁷ See *Pegasus School of Liberal Arts & Sciences v. Ball-Lowder*, 2013 WL 6063834, *5 (Tex. App.—Dallas 2013, pet. denied) (unpublished opinion).

Moreover, in a global sense, the Texas Legislature instructs:

“[A]n open-enrollment charter school is subject to federal and state laws and rules governing public schools and to municipal zoning ordinances governing public schools.”⁶⁸

This provision is set forth with the heading: “General Applicability of Laws, Rules, and Ordinances to Open-Enrollment Charter School.”⁶⁹ The expressed intent is clear and needs no explanation. Texas considers open-enrollment charter schools to be public bodies and to be treated the same as any other public school. There is only one other type of public school in Texas: school districts.⁷⁰

In the Secretary of Labor’s explanation of the definition of “political subdivision” contained in 29 C.F.R. 1975.5, the Secretary lists examples of entities that are normally regarded as political subdivisions.⁷¹ The example includes: “State, county, and municipal public school boards and commissions.”⁷² The NLRB finds state law declarations and interpretations of the public nature of an entity to be worthy of careful consideration.⁷³ In Texas, the state legislature has explicitly declared

⁶⁸ TEX. ED. CODE, § 12.103(a). Subsection (b) provides an exception for references contained inside the Education Code, where specific reference to their application to open-enrollment charter schools must be expressly stated. Subsection (c) exempts open-enrollment charter schools in small municipalities from compliance with certain zoning ordinances. Read together, all federal and state laws and rules outside of the Texas Education Code which apply to public schools apply equally to open-enrollment charter schools (except for certain municipal zoning ordinances).

⁶⁹ TEX. ED. CODE, § 12.103.

⁷⁰ See *San Antonio I.S.D. v. McKinney*, 936 S.W.2d 279, 282 (Tex. 1996).

⁷¹ 29 C.F.R. 1975.5.

⁷² *Id.*

⁷³ *NLRB v. Nat. Gas Util. Dist. of Hawkins Cty., Tenn.*, 402 U.S. 600, 602, 91 S.Ct. 1746, 29 L.Ed.2d 206 (1971).

that open-enrollment charter schools are to be governed by the same federal rules that apply to other public schools.⁷⁴ To the extent the NLRB considers the position of the State of Texas on this issue, the Texas Legislature has spoken quite clearly that it intends open-enrollment charter schools to be treated as public schools under federal law.⁷⁵

Free public education is a governmental function in Texas. Texas open-enrollment charter schools (along with school districts) bear the primary responsibility for implementation of the state's system of constitutionally mandated free public education.⁷⁶ Texas open-enrollment charter schools are treated as governmental bodies, with the corresponding rights and responsibilities that go along with such status.

2. The Texas Commissioner of Education has the Power to Remove and/or Appoint Board Members of a Texas Open-Enrollment Charter School.

The Texas Commissioner of Education retains the ability to reconstitute the governing body of a Texas open-enrollment charter school if the Commissioner determines that the charter school:

- (1) committed a material violation of the charter, including failure to satisfy accountability provisions prescribed by the charter;
- (2) failed to satisfy generally accepted accounting standards of fiscal management;

⁷⁴ TEX. ED. CODE, § 12.103.

⁷⁵ *Id.*

⁷⁶ TEX. ED. CODE § 11.002.

- (3) failed to protect the health, safety, or welfare of the students enrolled at the school;
- (4) failed to comply with [Subchapter D, Chapter 12 of the Texas Education Code] or another applicable law or rule;
- (5) failed to satisfy the performance framework standards adopted under [Texas Education Code] [Section 12.1181](#); or
- (6) is imminently insolvent as determined by the commissioner in accordance with commissioner rule.⁷⁷

As a part of this reconstitution of the governing body, the Texas Legislature has specifically granted the Commissioner the power to remove board members and appoint board members.⁷⁸ Furthermore, the Commissioner has the power to revoke the charter of the school if it fails for three consecutive years to meet performance standards in either academics or financial accountability.⁷⁹ Texas open-enrollment charter schools report directly to the Texas Commissioner of Education on their academic and financial accountability and are annually required to submit to the Commissioner an independent audit conducted by an outside auditing firm.⁸⁰

The Texas Commissioner of Education has the right and statutory authority to audit a Texas open-enrollment charter school at any time for cause, and at least once a year without cause.⁸¹ This is in addition to the requirement that these schools provide the Commissioner with an annual audit performed by an outside independent

⁷⁷ TEX. ED. CODE, §§ 12.115 and 12.116.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ TEX. ED. CODE, §§ 12.1181; *see also* 19 TEX. ADMIN. CODE § 100.1047.

⁸¹ TEX. ED. CODE, §§ 12.1163

auditor.⁸² The Commissioner’s audit may include matters directly related to the management or operation of the open-enrollment charter school, including any financial and administrative records.⁸³ In addition to removing and appointing board members of the school, the Commissioner retains power to withhold funding, suspend authority to operate, or take any other reasonable action deemed necessary to protect the health, safety and welfare of the students of a school.⁸⁴

Texas open-enrollment charter schools are *controlled* by the Texas Commissioner of Education inasmuch as they report their activities and financial and academic performance to him, and if they fail to meet the Commissioner’s standards, the Commissioner may investigate them, sanction them, remove their board and appoint new members, and revoke their charter.

3. The Texas Supreme Court Considers Open-Enrollment Charter Schools to be Institutions, Agencies, or Organs of State Government Deriving Their Status and Authority from the State Constitution or Laws Passed by the Legislature Pursuant to the Constitution.

In 2011, the Texas Supreme Court considered whether an open-enrollment charter school was a “governmental unit,” as that term is defined in the Texas Tort Claims Act, in the case of *LTTS Charter School, Inc. v. C2 Construction, Inc.*⁸⁵ At issue in that case was whether a Texas open-enrollment charter school is an “institution, agency, or organ of government the status and authority of which are derived from

⁸² TEX. ED. CODE, §§ 12.1181; *see also* 19 TEX. ADMIN. CODE § 100.1047.

⁸³ *Id.*

⁸⁴ TEX. ED. CODE, §§ 12.1162.

⁸⁵ *See LTTS Charter School, Inc. v. C2 Constr., Inc.*, 342 S.W.3d 73, 269 Ed. Law. Rep. 932 (Tex. 2011).

the Constitution of Texas or from laws passed by the legislature under the constitution.”⁸⁶ The Court examined Texas open-enrollment charter schools and determined that these schools are “governmental units” under that definition.⁸⁷

In arriving at this conclusion, the Texas Supreme Court determined that their status as an “institution, agency, or organ of government” arose from the Texas Education Code, wherein they are described as “created in accordance with the laws of this state and, together with traditional public schools, hav[ing] the primary responsibility for implementing the state’s system of public education.”⁸⁸ As for their authority to be considered an “institution, agency, or organ of government,” the Court found “that too derives from ‘laws passed by the legislature under the constitution,’” citing an Education Code provision which provides that open-enrollment charter schools have “the powers granted to traditional public schools under Title 2 of the Education Code.”⁸⁹

The Texas Supreme Court remanded that case back to the Dallas Court of Appeals for reconsideration of the open-enrollment charter school’s claim of governmental immunity.⁹⁰ Upon remand, the Dallas Court of Appeals found that an

⁸⁶ *Id.*

⁸⁷ *Id.*, at 77-78.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*, at 82.

open-enrollment charter school is entitled to governmental immunity under a statute that, on its face, applies only to “political subdivisions.”⁹¹

Subsequently, the Dallas Court of Appeals decided in a different case that Texas open-enrollment charter schools are political subdivisions under the Texas Whistleblower Protection Act, and thus subject to its terms.⁹² The court of appeals relied heavily on the Texas Supreme Court’s decision in *C2 Construction*, writing:

A critical conclusion of the supreme court that directed our decision was that the status of open-enrollment charter schools “as ‘part of the public school system of the state’—and their authority to wield ‘the powers granted to [traditional public] schools’ and to receive and spend state tax dollars (and in many ways to function as a government entity)—derive wholly from the comprehensive statutory regime described above.”⁹³

C. Other Factors Which Can Be Considered.

The Secretary of State will, on occasion, consider factors to determine an entity’s status as a political subdivision, but it is not required to do so.⁹⁴ These factors, set forth in 29 C.F.R. § 1975.5, are:

Are the individuals who administer the entity appointed by a public official or elected by the general electorate? What are the terms and conditions of the appointment? Who may dismiss such individuals and under what procedures?

What is the financial source of the salary of these individuals?

Does the entity earn a profit? Are such profits treated as revenue?

⁹¹ *LTTs Charter School, Inc. v. C2 Const., Inc.*, 358 S.W.3d 725, 735-36 (Tex. App.—Dallas, pet. denied).

⁹² *Pegasus School of Liberal Arts & Sciences v. Ball-Lowder*, 2013 WL 6063834, *4 (Tex. App.—Dallas, pet. denied).

⁹³ *Id.*

⁹⁴ *Chicago Mathematics and Science Academy Charter School, Inc., Employer, and Chicago Alliance of Charter Teachers and Staff, IFT, AFT, AFL-CIO, Petitioner*, 359 N.L.R.B. 41 (2012), p. 5.

How are the entity's functions financed?

What are the powers of the entity and are they usually characteristic of a government rather than a private instrumentality like the power of eminent domain?

How is the entity regarded under State and local law as well as under other Federal laws?

Is the entity exempted from State and local tax laws?

Are the entity's bonds, if any, tax-exempt?

As to the entity's employees, are they regarded like employees of other State and political subdivisions?

What is the financial source of the employee-payroll?

How do employee fringe benefits, rights, obligations, and restrictions of the entity's employees compare to those of the employees of other State and local departments and agencies?

Given this list of questions calling for answers, the response is best shown by answering them individually and specifically.

Are the individuals who administer the entity appointed by a public official or elected by the general electorate? What are the terms and conditions of the appointment? Who may dismiss such individuals and under what procedures?

A charter applicant submits a proposal for membership of the governing body of the open-enrollment charter school, including board members and administrators, to the State Board of Education in its charter application. The application includes notarized biographical affidavits from the proposed board members. The State Board of Education weighs the application and determines whether to grant them. They typically grant less than 20% of the applications. The Commissioner of Education

has veto power to deny any application, even if the State Board of Education approves it, and has exercised this power in the past.

Once a charter is granted, the entity's board is then governed by its bylaws, which are filed with and approved by the Commissioner of Education. Should the entity fail to meet performance standards set by the Commissioner of Education, the Commissioner holds the power to remove board members, appoint board members, sanction the school, withhold funding from the school, and revoke its charter.

Universal Academy would point out the United States Supreme Court has ruled that “the Board test is not whether the entity is administered by ‘State-appointed or elected officials.’ Rather, alternative (2) of the test is whether the entity is ‘administered *by individuals who are responsible to public officials* or to the general electorate.”⁹⁵ As announced above, Texas open-enrollment charter schools are held strictly responsible to the Texas Commissioner of Education.

<i>What is the financial source of the salary of these individuals?</i>

The board members of a Texas open-enrollment charter school serve without compensation, with the exception that a person employed by the school for school-related services (administration, teaching, etc.) may be compensated for the performance of those duties if the board follows statutory conflict of interest procedures for political officials in determining the compensation of that individual.

⁹⁵ *Id.* (emphasis in original).

All salaries paid to school personnel for all positions come from public funds paid to the school by state and federal sources.

Does the entity earn a profit? Are such profits treated as revenue?

Texas open-enrollment charter schools are required to be non-profit entities.⁹⁶

How are the entity's functions financed?

Through state and federal funding.⁹⁷ Additionally, like school districts, open-enrollment charter schools may also accept private donations. Universal Academy estimates that it receives at least 93% of its funding from the State of Texas under a statutory per-pupil allotment. The remainder consists of federal funds.

What are the powers of the entity and are they usually characteristic of a government rather than a private instrumentality like the power of eminent domain?

Texas open-enrollment charter schools “wield the powers granted to traditional public schools,” according to the Texas Supreme Court.⁹⁸ They are charged, along with school districts, with primary responsibility by the state legislature for implementation of the state’s free public education system under the state constitution.⁹⁹ The State of Texas has always considered the provision of its free

⁹⁶ See TEX. ED. CODE, § 12.101.

⁹⁷ See TEX. ED. CODE, § 12.106.

⁹⁸ *C2 Constr.*, 342 S.W.3d, at 78.

⁹⁹ See TEX. ED. CODE, § 11.002.

public school to be a “purely governmental act” and not in any way a private or proprietary act.¹⁰⁰

How is the entity regarded under State and local law as well as under other Federal laws?

Charter schools are treated as governmental bodies by the state government. The Supreme Court of Texas has deemed a charter school to be an “institution, agency, or organ of government the status and authority of which are derived from the Constitution of Texas or from laws passed by the legislature under the constitution.”¹⁰¹ Under Federal law, charter schools are considered “Local Educational Agencies,” or LEAs, a group which also encompasses school districts. All Federal funds received by Texas open-enrollment charter schools, including approximately 7% of Universal Academy’s annual budget, come to them as LEAs. Under Federal law, LEAs are defined as follows:

The term “local educational agency” means a public board of education or other public authority legally constituted within a State for either administrative control or direction of, or to perform a service function for, public elementary schools or secondary schools in a city, county, township, school district, or other political subdivision of a State, or of or for a combination of school districts or counties that is recognized in a State as an administrative agency for its public elementary schools or secondary schools...

¹⁰⁰ *Stout v. Grand Prairie Independent School Dist.*, 733 S.W.2d, at 296; *Braun v. Trustees of Victoria I.S.D.*, 114 S.W.2d 947, 949-50 (Tex.Civ.App.—San Antonio 1938, writ ref’d.).

¹⁰¹ *C2 Const.*, 342 S.W.3d, at 78.

The term includes any other public institution or agency having administrative control and direction of a public elementary school or secondary school.¹⁰²

In fact, in the entire history of open-enrollment charter schools in Texas, every state and federal court decision (which has not been overruled) determining the status of open-enrollment charter schools has found them to be governmental and public bodies:

Are Not Governmental Entities

*Obnesorge v. Winfree Academy Charter School*¹⁰³
(**overruled**)

*Terrell v. Texas Serenity Acad., Inc.*¹⁰⁴
(**overruled**)

Are Governmental Entities

*LTTS Charter School, Inc. v. C2 Constr., Inc.*¹⁰⁵
(**“governmental unit”**)

*Pippins v. Schneider*¹⁰⁶
(**“charter schools are public schools”**)

*Metro. Theatre, LLC v. Yes Prep Pub. School, Inc.*¹⁰⁷
(**“governmental unit”**)

¹⁰² 20 U.S.C.A., §7801(26)(a) and (b)

¹⁰³ *Obnesorge v. Winfree Academy Charter School*, 328 S.W.3d 654 (Tex. App.—Dallas 2010, no pet.) (*overruled* by *Pegasus School of Liberal Arts & Sciences v. Ball-Lowder*, 2013 WL 6063834 (Tex. App.—Dallas 2013, pet. denied) (unpublished opinion).

¹⁰⁴ *Terrell v. Texas Serenity Acad., Inc.*, 290 S.W.3d 424 (Tex. App.—Houston [14th Dist.] 2009, no pet.) (*overruled* by *LTTS Charter School, Inc. v. C2 Constr., Inc.*, 342 S.W.3d 73 (Tex. 2011).

¹⁰⁵ *LTTS Charter School, Inc. v. C2 Constr., Inc.*, 342 S.W.3d 73 (Tex. 2011) (**“governmental unit”**).

¹⁰⁶ *Pippins v. Schneider*, 2014 WL 108734 (S.D. Tex. 2014), *aff’d sub nom.*, *Robinson v. Schneider*, 614 F. Appx. 222 (5th Cir. 2015) (**“charter schools are public schools”**).

¹⁰⁷ *Metro. Theatre, LLC v. Yes Prep Pub. School, Inc.*, 2016 WL 743590 (Tex. App.—Hous. [1st Dist. Feb. 25, 2016, no pet. hist.) (**“governmental unit”**).

*Neighborhood Centers Inc. v. Walker*¹⁰⁸
 (“**political subdivision**”)

*Rosenberg v. KIPP, Inc.*¹⁰⁹
 (“**political subdivision**”)

*KIPP, Inc. v. Whitehead*¹¹⁰
 (“**political subdivision**”)

*Pegasus School of Liberal Arts & Sciences v. Ball-Lowder*¹¹¹
 (“**political subdivision**”)

*El Paso Educ. Initiative, Inc. v. Amex Properties*¹¹²
 (“**political subdivision**”)

Because the NLRB finds state law declarations and interpretations of the public nature of an entity to be worthy of careful consideration, Universal Academy offers these declarations and interpretations to demonstrate unity among the legislative and judicial branches of Texas in concluding open-enrollment charter schools are public bodies.¹¹³

¹⁰⁸ *Neighborhood Centers Inc. v. Walker*, 2015 WL 4593436 (Tex. App.—Hous. [1st Dist.] 2015, no pet.) (“**political subdivision**”).

¹⁰⁹ *Rosenberg v. KIPP, Inc.*, 458 S.W.3d 171 (Tex. App.—Hous. [14th Dist.] 2015, pet. denied) (“**political subdivision**”).

¹¹⁰ *KIPP, Inc. v. Whitehead*, 446 S.W.3d 99 (Tex. App.—Hous. [1st Dist.] 2014, pet. denied) (“**political subdivision**”).

¹¹¹ *Pegasus School of Liberal Arts & Sciences v. Ball-Lowder*, 2013 WL 6063834 (Tex. App.—Dallas 2013, pet. denied) (unpublished opinion) (“**political subdivision**”).

¹¹² *El Paso Educ. Initiative, Inc. v. Amex Properties, LLC*, 385 S.W.3d 701 (Tex. App. —El Paso 2012, pet. denied) (“**political subdivision**”).

¹¹³ *NLRB v. Nat. Gas Util. Dist. of Hawkins Cty., Tenn.*, 402 U.S. 600, 602, 91 S.Ct. 1746, 29 L.Ed.2d 206 (1971).

Is the entity exempted from State and local tax laws?

Yes. Property purchased or leased by a Texas open-enrollment charter school is considered public property for all purposes.¹¹⁴

Are the entity's bonds, if any, tax-exempt?

Yes. Open-enrollment charter schools may access tax-exempt revenue bonds from the Texas Public Finance Authority Charter School Finance Corporation for the acquisition, construction, repair, or renovation of educational facilities.¹¹⁵ Open-enrollment charter schools that have an investment grade rating and meet certain financial criteria can apply to have their bonds guaranteed by the Permanent School Fund, which results in the bonds being backed by the full, faith, and credit of the State of Texas.¹¹⁶

As to the entity's employees, are they regarded like employees of other State and political subdivisions?

Yes. The employees of Texas open-enrollment charter schools benefit from membership in the Texas Teacher Retirement System in the same manner as the employees of school districts.¹¹⁷ Further, the employees of a Texas open-enrollment charter school have the same immunity protections as their counterparts in school districts.¹¹⁸

¹¹⁴ See TEX. ED. CODE § 12.128(a)(1).

¹¹⁵ TEX. ED. CODE, § 45.054.

¹¹⁶ TEX. ED. CODE, §§ 45.054 and 53.351.

¹¹⁷ TEX. ED. CODE, § 12.1057.

¹¹⁸ TEX. ED. CODE, § 12.1056.

What is the financial source of the employee-payroll?

Texas open-enrollment charter schools pay employees from state and federal funds.

How do employee fringe benefits, rights, obligations, and restrictions of the entity's employees compare to those of the employees of other State and local departments and agencies?

In addition to membership in the Texas Teacher Retirement System and immunity equal to that of school district employees, open-enrollment charter schools provide health insurance to their employees and state-mandated training. The Texas Administrative Code sets forth particular training requirements for board members, chief executive officers, chief administrative officers, campus administrative officers, and business officers.¹¹⁹ To the extent applicable, employees are governed by Texas laws regarding conflict of interest and nepotism.¹²⁰

D. This Case is Different and Distinguishable from the Board's Prior Decisions Involving Charter Schools.

In 2002, in *Research Foundation of the City University of New York*, the Board set forth a precedent it would follow in *Chicago Mathematics & Science Academy Charter School, Inc.*, and which the Regional Director would follow in *Hyde Leadership Charter School—Brooklyn*.¹²¹ In determining a university foundation failed to meet the political subdivision test under the NLRA, the Board highlighted the fact that there was no

¹¹⁹ 19 TEX. ADMIN. CODE §§ 100.1101, 100.1102, 100.1103, 110.1104, and 100.1105.

¹²⁰ TEX. ED. CODE, §§ 12.1054 and 12.1055.

¹²¹ See *Research Foundation of the City University of New York*, 337 NLRB 965, 968 (2002).

state law which mandated the authority of a political official to appoint and remove board members.¹²² In *Research Foundation*, the bylaws of the foundation provided a political official with authority to appoint and remove its board members.¹²³ But the Board determined this was not enough. There needed to be a statute or some other sort of state law which provided this authority.¹²⁴ Thus, the foundation failed the political subdivision control test.¹²⁵

The Board followed the reasoning of *Research Foundation* ten years later in *Chicago Mathematics* and discussed its holding in some detail.¹²⁶ Noting the conclusion in *Research Foundation* was based upon the absence of a state law providing a political official with removal and appointment power, the Board declared it would examine the charter school under this same standard and determine whether the

selection and removal of the members of an employer's governing board are determined by law, or solely the employer's governing documents.¹²⁷

In *Chicago Mathematics*, the Board found not only was there no state law granting a public official appointment and removal power, but the bylaws of the charter school indicated only sitting board members could appoint and remove board members.¹²⁸

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ See *Chicago Mathematics & Science Academy Charter School, Inc.*, 359 NLRB 41, pp. 6-8.

¹²⁷ *Id.*, at p. 8.

¹²⁸ *Id.*, at p. 9.

There was no public official involved at all. The members were subject to appointment and removal *solely* by private individuals.¹²⁹ Accordingly, the Board found the charter school was not a political subdivision.

As support, the Board cited the decision of the National Labor Review Board in *Charter School Administration Services*.¹³⁰ That case did not involve a charter school, but rather a charter management company.¹³¹ The Board in *CSAS* found that not only was the board of directors not subject to appointment or removal by a public official, no person involved in running the entity had accountability to any public official.¹³²

The Board in *Chicago Mathematics* concluded that the charter school was an “employer” under the NLRA and not a political subdivision. In making this decision, however, the Board was careful to point out that it was confining its decision based on the facts of that case and charter schools in Illinois.¹³³ It refused to establish a precedent for charter schools in other states.¹³⁴

We certainly do not establish a bright-line rule that the Board has jurisdiction over entities that operate charter schools, wherever they are located and regardless of the legal framework that governs their specific relationships with state and local governments.¹³⁵

¹²⁹ *Id.*

¹³⁰ *Id.*; see also *Charter School Administrative Services*, 353 N.L.R.B. 394 (2008).

¹³¹ *Id.*, at p. 8.

¹³² *Id.*

¹³³ *Id.*, at p. 1.

¹³⁴ *Id.*

¹³⁵ *Id.*

As the Board rightly recognized, each state with charter schools has a unique framework setting forth the role and responsibilities of those schools to their states. Texas has a much more robust charter school system that clearly creates real accountability, control, and responsibility between the Texas Commissioner of Education and Texas open-enrollment charter schools.

Two years later, in *Hyde Leadership Charter School—Brooklyn*, the Regional Director of Region 29 in New York applied the same test, citing both *Research Foundation* and *Chicago Mathematics* as authority.¹³⁶ The charter agreement provided for removal of a board member by a political official in the narrow circumstance where the member made a material misstatement in a background statement or financial interest disclosure report.¹³⁷ However, and importantly, this removal power by the political official was only contained in the contract for charter and was not contained in any state law.¹³⁸ The Charter Schools Act of Illinois provided no authority for any political official to remove and replace board members of charter schools.¹³⁹ The Regional Director considered this the determinative factor in finding that the charter school did not meet the political subdivision test under the NLRA.¹⁴⁰

¹³⁶ See *Hyde Leadership Charter School—Brooklyn*, 29-RM-126444 (2014).

¹³⁷ *Id.*, at p. 13.

¹³⁸ *Id.*, at p. 25.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

The Board's decision in *Chicago Mathematics* now carries no precedent weight after *NLRB v. Noel Canning*, in which the Supreme Court invalidated the recess appointments of Board Members Griffin and Block, who provided a quorum in that case.¹⁴¹ Similarly, the Region 29 Director's decision in *Hyde Leadership* is not precedential to Region 16. Both, however, may be accorded persuasive weight by Region 16. In any event, even if Region 16 applies the rationale and conclusions reached in *Chicago Leadership* and *Hyde Park*, this case is distinguishable for very important reasons.

Primary among these distinctions is the fact that the Texas Legislature, by statute, grants the Texas Commissioner of Education the power to remove and appoint board members of any open-enrollment charter school if the Commissioner determines that the charter school:

- (1) committed a material violation of the charter, including failure to satisfy accountability provisions prescribed by the charter;
- (2) failed to satisfy generally accepted accounting standards of fiscal management;
- (3) failed to protect the health, safety, or welfare of the students enrolled at the school;
- (4) failed to comply with [Subchapter D, Chapter 12 of the Texas Education Code] or another applicable law or rule;
- (5) failed to satisfy the performance framework standards adopted under [Texas Education Code] Section 12.1181; or

¹⁴¹ See *NLRB v. Noel Canning*, 134 S.Ct. 2550, 189 L.Ed.2d 538 (2014); see also <https://www.nlr.gov/cases-decisions/information-decisions-issued-january-4-2012-board-member-appointees>.

(6) is imminently insolvent as determined by the commissioner in accordance with commissioner rule.¹⁴²

Texas open-enrollment charter schools pass the control test enunciated by the Board in *Research Foundation* and *Chicago Mathematics*, and applied by the Regional Director in *Hyde Leadership*. In Texas, we have very specific statutes granting this power to the Commissioner.¹⁴³ Not only are these entities administered by individuals who are responsible to a political official, the political official has the statutory power to reconstitute their boards.

E. Universal Academy, as a Texas Open-Enrollment Charter School, is a “Political Subdivision” and is thus Exempted from the Definition of “Employers” over whom this Board has Jurisdiction.

Universal Academy, as an open-enrollment charter school, is directly responsible to, and controlled by, the Texas Commissioner of Education. It issues regularly required reports to the Commissioner.¹⁴⁴ It presents annual, audited financials to the Commissioner.¹⁴⁵ It is rated each year by the Commissioner on its academic and financial performance, receiving grades for both.¹⁴⁶ The Commissioner holds the power to audit the management, academic, and financial records of Universal Academy.¹⁴⁷ The Commissioner may institute these audits at any time for

¹⁴² TEX. ED. CODE, §§ 12.115 and 12.116.

¹⁴³ TEX. ED. CODE, §§ 12.115 and 12.116.

¹⁴⁴ TEX. ED. CODE, § 12.1181; *see also* 19 TEX. ADMIN. CODE, § 100.1047.

¹⁴⁵ *Id.*

¹⁴⁶ 19 TEX. ADMIN. CODE, § 100.1027.

¹⁴⁷ TEX. ED. CODE, § 12.1163.

cause, and at least once a year without cause.¹⁴⁸ And, important to the NLRB's analysis, the Commissioner holds the right and ability to remove and appoint board members of Universal Academy.¹⁴⁹

The Supreme Court of the United States has specified that no requirement in law exists for an entity to have its board members appointed by political officials or be elected officials. The Fifth Circuit has held that the political official to whom the entity reports does not need to be involved in day-to-day operation. It is enough that the Texas Commissioner of Education holds the ability to remove and appoint board members of Universal Academy. Universal Academy meets the definition of a “political subdivision” under the NLRA and is, accordingly, not an employer over whom the NLRB has jurisdiction.

II. ANSWER TO THE COMPLAINT

Subject to, and without waiving, the foregoing objection to the jurisdiction of the NLRB over a political subdivision such as Universal Academy, a public open-enrollment charter school in Texas, Universal Academy offers the following answer to the Complaint filed in this matter:

¹⁴⁸ *Id.*

¹⁴⁹ TEX. ED. CODE, §§ 12.115 and 12.116.

First Unnumbered Paragraph

Universal Academy is not an “employer,” as defined by Section 2(2) of the National Labor Relations Act and the NLRB lacks jurisdiction to bring or consider a Complaint against Universal Academy.

Paragraph 1

Universal Academy reasserts that its employment relationships are beyond the jurisdiction of the NLRB because Universal Academy is a “political subdivision” as that term has been interpreted under the Act. Subject to, and without waiving its objection to jurisdiction, Universal Academy acknowledges and agrees with the dates and times of Charging Party’s filing of a charge in this matter.

Paragraph 2

Universal Academy reasserts that its employment relationships are beyond the jurisdiction of the NLRB because Universal Academy is a “political subdivision” as that term has been interpreted under the Act. Subject to, and without waiving its objection to jurisdiction, Universal Academy vigorously objects to the characterization of its function as “operating a private charter school.” As set forth in the foregoing Section I of this pleading, Universal Academy is a public open-enrollment charter school providing free public education in the State of Texas as guaranteed by the Texas Constitution. Universal Academy acknowledges that it is a nonprofit corporation with an office and place of business in Coppell, Texas.

Paragraph 3(a)

Universal Academy reasserts that its employment relationships are beyond the jurisdiction of the NLRB because Universal Academy is a “political subdivision” as that term has been interpreted under the Act. Subject to, and without waiving its objection to jurisdiction, Universal Academy acknowledges that its gross revenues exceeded \$1,000,000 during the fiscal year ending August 31, 2015. However, Universal Academy would point out again that it is a nonprofit corporation and it received these funds from the State of Texas to hold in trust for the education of public school students.

Paragraph 3(b)

Universal Academy reasserts that its employment relationships are beyond the jurisdiction of the NLRB because Universal Academy is a “political subdivision” as that term has been interpreted under the Act. Subject to, and without waiving its objection to jurisdiction, Universal Academy agrees that in fiscal year 2015 it purchased and received products, goods and materials valued in excess of \$5,000 from points outside of Texas.

Paragraph 4

Universal Academy reasserts that its employment relationships are beyond the jurisdiction of the NLRB because Universal Academy is a “political subdivision” as that term has been interpreted under the Act. Subject to, and without waiving its objection to jurisdiction, Universal Academy denies that it is an “employer” under

Section 2(2) of the Act because that provision explicitly provides that “political subdivisions” shall not be considered as employers under that definition. As set forth in the foregoing Section I of this pleading, Universal Academy fits within the definition of a “political subdivision” which is outside the jurisdiction of the NLRB.

Paragraph 5

Universal Academy reasserts that its employment relationships are beyond the jurisdiction of the NLRB because Universal Academy is a “political subdivision” as that term has been interpreted under the Act. Subject to, and without waiving its objection to jurisdiction, Universal Academy denies that the definitions for “supervisor” and “agent” apply to Universal Academy or any of its employees because those terms apply to “employers” under Section 2(2) of the Act and Universal Academy is not an “employer” under the Act because it is a “political subdivision” as that term has been interpreted under the Act. Otherwise, the Complaint correctly states the title that each person listed held during the financial year ending August 31, 2015.

Paragraph 6

Universal Academy reasserts that its employment relationships are beyond the jurisdiction of the NLRB because Universal Academy is a “political subdivision” as that term has been interpreted under the Act. Subject to, and without waiving its objection to jurisdiction, Universal Academy denies the allegations in paragraph 6 and demands strict proof thereof.

Paragraph 7

Universal Academy reasserts that its employment relationships are beyond the jurisdiction of the NLRB because Universal Academy is a “political subdivision” as that term has been interpreted under the Act. Subject to, and without waiving its objection to jurisdiction, Universal Academy denies the allegations in paragraph 7 and demands strict proof thereof.

Paragraph 8(a)

Universal Academy reasserts that its employment relationships are beyond the jurisdiction of the NLRB because Universal Academy is a “political subdivision” as that term has been interpreted under the Act. Subject to, and without waiving its objection to jurisdiction, Universal Academy denies the allegations in paragraph 8(a). Universal Academy specifically denies that Ms. Free raised “employee concerns” at the meeting in question, and Universal Academy also specifically denies that Ms. Free “concertedly complained to Respondent regarding the wages, hours, and working conditions of Respondent’s employees.” The factual recitation in paragraph 8(a) is inaccurate and Ms. Free’s comments at the meeting were not made on behalf of anyone other than Ms. Free, who asked questions about her role on days when she participated in the Maker Space Program. Ms. Free neither made concerted complaints at that meeting regarding wages, hours, and working conditions of other employees nor raised any employee concerns.

Paragraph 8(b)

Universal Academy reasserts that its employment relationships are beyond the jurisdiction of the NLRB because Universal Academy is a “political subdivision” as that term has been interpreted under the Act. Subject to, and without waiving its objection to jurisdiction, Universal Academy denies the allegations in paragraph 8(b) and demands strict proof thereof. Universal Academy specifically denies that Ms. Blackmon “threatened an employee with discharge because the employee engaged in the protected activity.” This factual recitation is inaccurate and Ms. Free did not engage in any protected concerted activity.

Paragraph 8(c)

Universal Academy reasserts that its employment relationships are beyond the jurisdiction of the NLRB because Universal Academy is a “political subdivision” as that term has been interpreted under the Act. Subject to, and without waiving its objection to jurisdiction, Universal Academy denies the allegations in paragraph 8(c) and specifically denies that Ms. Free was “discharged.” Ms. Free tendered a handwritten resignation to Universal Academy.

Paragraph 8(d)

Universal Academy reasserts that its employment relationships are beyond the jurisdiction of the NLRB because Universal Academy is a “political subdivision” as that term has been interpreted under the Act. Subject to, and without waiving its objection to jurisdiction, Universal Academy denies the allegations in paragraph 8(d)

and incorporates its answers to Paragraphs 8(a) and 8(d) and specifically denies that Ms. Free engaged in any protected concerted activity and specifically denies that Ms. Free was discharged by Universal Academy.

Paragraph 9

Universal Academy reasserts that its employment relationships are beyond the jurisdiction of the NLRB because Universal Academy is a “political subdivision” as that term has been interpreted under the Act. Subject to, and without waiving its objection to jurisdiction, Universal Academy denies the allegations in paragraph 9 and specifically denies it has interfered with, restrained, or coerced employees in the exercise of any rights they hold. Because Paragraph 9 of the Complaint references Paragraphs 6 through 8 of the Complaint, Respondent incorporates its Answers to Paragraphs 6 through 8 of the Complaint.

Paragraph 10

Universal Academy reasserts that its employment relationships are beyond the jurisdiction of the NLRB because Universal Academy is a “political subdivision” as that term has been interpreted under the Act. Subject to, and without waiving its objection to jurisdiction, Universal Academy denies the allegations in paragraph 10 and specifically denies that it engaged in any unfair labor practices or is otherwise subject to the Act.

Paragraph 11

Universal Academy reasserts that its employment relationships are beyond the jurisdiction of the NLRB because Universal Academy is a “political subdivision” as that term has been interpreted under the Act. Subject to, and without waiving its objection to jurisdiction, Universal Academy denies the allegations in paragraph 11 and specifically denies that it has engaged in unfair labor practices or is otherwise subject to the Act. Universal Academy also specifically denies that a “remedy” is necessary because of any alleged act of Universal Academy and specifically denies that Charging Party has been damaged.

PRAYER

For the foregoing reasons, Universal Academy prays that the Board dismiss the charge against Universal Academy for lack of jurisdiction. Subject to, and without waiving, this objection to jurisdiction, Universal Academy prays that the Board render a decision in its favor in this matter and dismiss all claims against it.

Respectfully submitted,

THE FULLER LAW GROUP, PLLC

By:



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CERTIFICATE OF SERVICE

On January 5, 2017, a true and correct copy of the foregoing Motion to Dismiss for Lack of Jurisdiction was electronically filed with the NLRB in this matter and served via certified mail, return receipt requested, on all counsel of record and parties as listed below:

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Thomas A. Fuller

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 16

LTTS CHARTER SCHOOL, INC.,
d/b/a UNIVERSAL ACADEMY

and

Case 06-CA-170669

KIMBERLY FREE, an Individual

**RESPONDENT LTTS CHARTER SCHOOL,
INC. D/B/A UNIVERSAL ACADEMY'S FIRST
AMENDED OBJECTION TO JURISDICTION
AND PLEA TO THE JURISDICTION, AND,
SUBJECT THERETO, FIRST AMENDED
ORIGINAL ANSWER**

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TO THE HONORABLE NATIONAL LABOR RELATIONS BOARD:

RESPONDENT LTTS Charter School, Inc. d/b/a Universal Academy (“Universal Academy”) files this, its First Amended Objection to Jurisdiction and Plea to the Jurisdiction, and, Subject Thereto, First Amended Original Answer, and in support hereof show as follows:

I. FIRST AMENDED OBJECTION TO JURISDICTION AND PLEA TO THE JURISDICTION

As a Texas open-enrollment public charter school, Respondent Universal Academy objects to the jurisdiction asserted by the National Labor Relations Board over this matter and urges the Board to dismiss this Complaint. The Board does not have jurisdiction over this Texas open-enrollment public charter school, which is a political subdivision under the National Labor Relations Act and thus exempted from the definition of an “employer” over whom the NLRB has jurisdiction.

STATEMENT OF FACTS

Kimberly Free, a former teacher at Universal Academy, filed a charge with the National Labor Relations Board alleging Universal Academy discriminated against her by threatening her with discipline and terminating her for engaging in protected concerted activity. While Universal Academy vigorously denies the merits of these allegations (Ms. Free voluntarily resigned, tendering a hand-written and signed letter of resignation, and Ms. Free was not involved in any protected concerted activity), it is

first and foremost important for Universal Academy to object to the Board's assertion of jurisdiction to hear this matter.

Universal Academy is a Texas non-profit corporation operating a Texas open-enrollment public charter school with two campuses in the greater Dallas area. Universal Academy was granted a Contract for Charter on May 18, 1998 by the Texas State Board of Education, and its charter has subsequently been renewed through July 31, 2022. At all times relevant to this case, Universal Academy has held a valid and active Contract for Charter with the Texas State Board of Education.

SUMMARY OF THE ARGUMENT

Texas open-enrollment charter schools, such as Universal Academy, are political subdivisions under the National Labor Relations Act. Texas open-enrollment charter schools are administered by individuals who are responsible to the Texas Commissioner of Education and the State Board of Education. The responsibility is real. These charter schools are held strictly accountable for both their academic and financial performance and are rated on both each year. The Texas Education Code grants the Texas Commissioner of Education the authority to remove and appoint board members of the governing body of a Texas open-enrollment charter school when requisite standards are not met, and to audit them as the Commissioner deems necessary.¹

¹ See TEX. ED. CODE, §§ 12.115 and 12.116.

Moreover, Texas open-enrollment charter schools are considered “public schools” in Texas, and the Texas Supreme Court has found them to be “an institution, agency, or organ of government,” the status and authority of which are derived from the Constitution of Texas or from laws passed by the legislature under the Constitution.² As such, Universal Academy fits squarely within the definition of a “political subdivision” that is excepted from the jurisdiction of the NLRB.

ARGUMENT

A. The “Political Subdivision” Exception from the National Labor Relations Act.

1. The Board’s Jurisdiction.

In 1935, the United States Congress passed the National Labor Relations Act. The employment protections of the Act extend only to workers qualifying as “employees” under the Act, which in turn is limited to those individuals who are employed by an entity meeting the NLRA’s definition of “employer.”³ Excepted from the definition of “employer” under the NLRA is “any State or political subdivision thereof.”⁴ The National Labor Relations Board is charged with enforcement of the NLRA, but its jurisdiction for enforcement extends only to those

² See *LTTS Charter School, Inc. v. C2 Construction, Inc.*, 342 S.W.3d 73, 77-78 (Tex. 2011).

³ See generally, 29 U.S.C.A. § 152.

⁴ *Id.*

employees and employers covered by the Act. Its jurisdiction does not extend to the “political subdivisions of a State.”⁵

2. How a “Political Subdivision” is Defined.

The NLRA does not provide a definition of a “political subdivision.”⁶ In the case of *NLRB v. Nat. Gas Util. Dist. of Hawkins Cty., Tenn.*, the Supreme Court considered and approved of a test used by the Board to determine whether an entity was a “political subdivision” of a state, where an entity was considered to be a political subdivision if it was:

(1) created directly by the state, so as to constitute departments or administrative arms of the government, or

(2) administered by individuals who are responsible to public officials or to the general electorate.⁷

In that case, the Court noted:

[T]he Board test is not whether the entity is administered by ‘State-appointed or elected officials.’ Rather, alternative (2) of the test is whether the entity is ‘administered *by individuals who are responsible to public officials* or to the general electorate.’⁸

⁵ See *NLRB v. Nat. Gas Util. Dist. of Hawkins Cty., Tenn.*, 402 U.S. 600, 602-03, 91 S.Ct. 1746, 29 L.Ed.2d 206 (1971).

⁶ See 29 U.S.C.A. § 152.

⁷ *Hawkins County*, 402 U.S., at 604.

⁸ *Id.* (emphasis in original).

Around seven months after the Supreme Court’s decision in *Hawkins County*, the Secretary of Labor promulgated 29 C.F.R. § 1975.5, providing a formal definition and test for determining a “political subdivision”:⁹

Tests. Any entity which has been (1) created directly by the State, so as to constitute a department or administrative arm of the government, or (2) administered by individuals who are controlled by public officials and responsible to such officials or to the general electorate, shall be deemed to be a ‘State or political subdivision thereof’ ... and, therefore, not within the definition of employer, and, consequently, not subject to the Act as an employer.¹⁰

The Board continues to use this definition.¹¹ This test has been confirmed by the federal circuit courts of appeal as being identical to the test considered by the Supreme Court in *Hawkins County*.¹²

3. The Holding in *StarTran*.

In *StarTran, Inc. v. Occupational Safety and Health Review Commission*, the Fifth Circuit reviewed the Occupational Safety and Health Review Commission’s determination that StarTran, Inc. was not a political subdivision.¹³ StarTran was a non-profit corporation created to assist Capital Metro, an Austin, Texas transportation authority, with employment issues.¹⁴ The Occupational Safety and

⁹ While this regulation pertained to OSHA, this definition of “political subdivision” has been applied equally to analysis of all entities claiming political subdivision status under the NLRA.

¹⁰ 29 C.F.R. § 1975.5(b).

¹¹ See *StarTran, Inc. v. Occupational Safety and Health Review Com’n.*, 608 F.3d 312, 314 (5th Cir. 2010).

¹² See *StarTran*, 608 F.3d, at 315; see also *Brock v. Chicago Zoological Soc.*, 820 F.3d 909 (7th Cir. 1987).

¹³ See *StarTran*, 608 F.3d, at 315.

¹⁴ *Id.*

Health Review Commission sought to enforce a citation against StarTran for an alleged violation.¹⁵ The Commission asserted jurisdiction over StarTran by determining StarTran was not a political subdivision exempt from OSHA coverage.¹⁶ StarTran challenged this assertion of jurisdiction.

The issue in the case boiled down to the Commission's assertion that StarTran's board was not *controlled* by a political official.¹⁷ The board members were appointed by Capital Metro, an undisputed political subdivision, and were removable by Capital Metro.¹⁸ However, the Commission found that StarTran controlled the day-to-day working conditions of its employees and concluded that Capital Metro did not "control" StarTran's daily activities.¹⁹ This was the ultimate basis for the Commission's determination that StarTran was not an exempt political subdivision.²⁰

The Fifth Circuit disagreed with the Commission and reversed the Commission's decision and remanded the case for dismissal of the citation for lack of jurisdiction.²¹ The Court concluded that the *control test* is not whether the political official (to whom the entity is responsible) controls daily activities or operations, but

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*, at 320-21.

¹⁸ *Id.*

¹⁹ *Id.*, at 322-23.

²⁰ *Id.*

²¹ *Id.*, at 324-25

rather whether that political official has the *ability* to control the board by removing or appointing board members.²²

The matters of “control of day to day working conditions of employees” or “day-to-day control of employees,” or the equivalent thereof, are not mentioned anywhere in section 1975.5... To allow the Secretary to add, on an ad hoc individual case by case basis, controlling requirements for meeting the political subdivision test of section 1975(b)(2) that are nowhere mentioned in section 1975.5, is to in effect render the regulation meaningless, and essentially say that a political subdivision is whatever the Secretary thinks it is in each or any particular case. That is simply not reasonable.²³

The Fifth Circuit also declared it was unaware of any court decision holding an entity whose board was subject to appointment and removal by one or more public officials to be anything other than a “political subdivision.”²⁴

The cases in this area have generally held that if a majority of the board of directors of the claimed political subdivision is *not* subject to selection or removal by public officials or the general electorate, then the entity *for that reason* fails the second alternative test for being a political subdivision under section 152(2).²⁵

Thus, as interpreted by the Supreme Court and the Fifth Circuit, if a non-profit corporation is administered by individuals who are responsible to a public official and the public official retains the right and ability to remove and/or appoint board members of that entity, the entity will be considered a “political subdivision” that is exempted from the NLRB’s jurisdiction.

²² *Id.*

²³ *Id.*

²⁴ *Id.* at 324.

²⁵ *Id.*, at 323 (emphasis in original).

In determining whether an entity created under state law is a political subdivision under the NLRA, federal law, rather than state law, governs the determination.²⁶ However, state law declarations and interpretations, though not necessarily controlling, are given careful consideration.²⁷ The Supreme Court has acknowledged that in many cases, the application of federal law may depend on state law.²⁸

In this case, the controlling test of whether a Texas open-enrollment charter school is a political subdivision exempted from the NLRA will be whether the entity is “administered by individuals who are responsible to public officials.”²⁹ To make this determination, the Fifth Circuit instructs the NLRB to use a control test to determine whether the public official to whom the governing body reports retains a right and ability to remove and/or appoint board members of that entity.³⁰ If so, the entity is a political subdivision exempt from the NLRA.³¹

²⁶ See *Hawkins Cty.*, 402 U.S., at 602-03.

²⁷ *Id.*

²⁸ *Id.*, at 603.

²⁹ *Id.*, at 604-605.

³⁰ *StarTran*, 608 F.3d, at 322.

³¹ *Id.*

B. Texas Open-Enrollment Charter Schools are “Political Subdivisions,” and thus Exempt from the National Labor Relations Act.

1. Texas Open-Enrollment Charter Schools are “Administered by Individuals Who are Responsible to Public Officials.”

a. Texas Open-Enrollment Charter Schools.

The Texas Constitution mandates that the Texas Legislature create a public school system:

A general diffusion of knowledge being essential to the preservation of liberties and rights of the people, it shall be the duty of the Legislature of the State to establish and make suitable provision for the support and maintenance of an efficient system of public free schools.”³²

The Texas Legislature, in obedience to this constitutional mandate, created a public school system.³³ The public school system created by the Texas Legislature has long been considered a division or department of the government.³⁴ In stressing the importance of the role of the public school system in Texas, the Texas Supreme Court has pointed out the Texas Constitution’s link between free public education and the preservation of the liberties and rights of the citizens of this state.³⁵

The Texas Constitution gives the Texas Legislature sole authority to set the policies and fashion the means for providing a public school system.³⁶ The discretion given to the Texas Legislature to implement the public school system in this state is

³² TEX. CONST. art. VII, § 1.

³³ *Mumme v. Marry*, 40 S.W.2d 31, 34 (Tex. 1931).

³⁴ *Id.*, at 35.

³⁵ *Neeley v. West Orange-Cove Consol. I.S.D.*, 176 S.W.3d 746, 785 (Tex. 2005).

³⁶ *West Orange-Cove Consol. I.S.D. v. Alanis*, 107 S.W.3d 558, 563 (Tex. 2003).

broad and of considerable latitude.³⁷ The Texas Constitution does not dictate a particular structure for the system of free public schools.³⁸ It is the Texas Legislature's province to "decide whether the regime should be administered by a state agency, by the districts themselves, or by any other means."³⁹

From the days of the Texas Republic up until the mid-1990s, the Texas Legislature implemented its constitutional mandate of providing free public education through school districts.⁴⁰ In 1993, the 73rd Texas Legislature enacted Senate Bill 7, abolishing the Texas Central Education Agency over the next two years and repealing Titles 1 (General Provisions) and 2 (Public Education) of the Texas Education Code, excepting out only certain school finance chapters.⁴¹ To effect this broad overhaul of the Texas public school system, Senate Bill 7 appointed a Joint Select Committee to focus on the *delivery* of educational programs and services in the public school system.⁴² The Joint Select Committee issued a Final Report in December of 1994 recommending, among other things, that the 74th Texas Legislature consider charter schools "as a means to enhance public school choice."⁴³

³⁷ *Id.*

³⁸ *Neeley*, 176 S.W.3d, at 783.

³⁹ *Alanis*, 107 S.W.3d, at 571.

⁴⁰ See *San Antonio I.S.D. v. McKinney*, 936 S.W.2d 279, 282 (Tex. 1996).

⁴¹ See Act of May 28, 1993, 73rd Leg., R.S., ch. 347, §§ 8.33 and 8.35, 1993 Tex. Gen. Laws 1479, 1556.

⁴² See JOINT SELECT COMM. TO REVIEW THE CENTRAL EDUC. AGENCY, FINAL REPORT TO THE 74TH LEGISLATURE, p. 1, Tex. S.B. 7 (1994).

⁴³ See *Id.*, at p. 25.

In 1995, the 74th Texas Legislature created Texas open-enrollment charter schools as public schools that offer alternatives to the public school district system, foster educational competition, and offer parents alternatives in choice of public schools.⁴⁴ The Texas Education Code describes open-enrollment charter schools as a “part of the public school system of this state.”⁴⁵ State-approved open-enrollment charter schools may be granted to non-profit organizations, institutions of higher education, or other governmental entities.⁴⁶ These organizations submit an application to the Texas Education Agency pursuant to criteria set forth by the Commissioner of the Board of Education, and, if approved, are granted a charter.⁴⁷

b. These Public Schools are State Funded.

Texas open-enrollment charter schools are funded with public monies and are generally required to follow most of the same administrative, fiscal and legal requirements as traditional school districts.⁴⁸ These schools do not charge tuition.⁴⁹ Their state funding is comprised of per pupil allotments, similar to that paid to public independent school districts.⁵⁰ The funds received by a charter school from the State

⁴⁴ See TEX. ED. CODE, § 12.001.

⁴⁵ TEX. ED. CODE, § 12.105.

⁴⁶ See TEX. ED. CODE, § 12.101 (a).

⁴⁷ See TEX. ED. CODE, §§ 12.110 and 12.1101.

⁴⁸ See *gen.*, TEX. ED. CODE, §§ 12.101 - 12.133.

⁴⁹ See TEX. ED. CODE, § 12.108.

⁵⁰ See *Id.*

of Texas “are considered to be public funds for all purposes under state law.”⁵¹ They are held in trust by the charter school for the benefit of its students.⁵² Any property purchased or leased with these public funds is deemed to be public property for all purposes.⁵³

c. These Public Schools Perform the Purely Governmental Function of Providing Free Public Education Pursuant to Constitutional Mandate and the Texas Legislature’s Scheme for Free Public Education.

Texas open-enrollment charter schools perform the purely governmental function of implementing the state’s constitutionally mandated system of providing free public education.⁵⁴ The Legislature put charter schools on equal footing with school districts in their responsibility for executing the constitutional mandate for provision of free public schools:

The school districts and charter schools created in accordance with the laws of this state have the primary responsibility for implementing the state’s system of public education and ensuring student performance in accordance with this code.⁵⁵

and

An education function not specifically delegated to the [Texas Education Agency] or the [State Board of Education] under this [Education] code is

⁵¹ TEX. ED. CODE, § 12.107.

⁵² TEX. ED. CODE § 12.107(a)(2).

⁵³ See TEX. ED. CODE § 12.128(a)(1).

⁵⁴ See TEX. ED. CODE § 12.105; see also *LTTs Charter School, Inc.*, 342 S.W.3d, at 77-78.

⁵⁵ TEX. ED. CODE §11.002.

reserved to and shall be performed by school districts or open-enrollment charter schools.⁵⁶

In Texas, the provision of public education is deemed to be a purely governmental function.⁵⁷ In *Braun v. Trustees of Victoria I.S.D.*, even the planting of a tree on school grounds was deemed to be a governmental act.⁵⁸ In fact, it does not appear that a court of this state has ever held any act of a public school to be proprietary.⁵⁹

Texas open-enrollment charter schools are treated as public bodies under Texas law. They are subject to the open records and open government requirements of the Texas Government Code to the same extent as any other state administrative branch.⁶⁰ They participate in the Texas Teacher Retirement System to the same extent as school districts.⁶¹ They have immunity from lawsuits to the same extent as school districts and other political subdivisions, and their employees have immunity to the same extent as their school district counterparts.⁶² They are governed by statutes which apply, by their terms, to political subdivisions of Texas for all purchasing and

⁵⁶ TEX. ED. CODE § 7.003.

⁵⁷ *Stout v. Grand Prairie Independent School Dist.*, 733 S.W.2d, at 296; *Braun v. Trustees of Victoria I.S.D.*, 114 S.W.2d 947, 949-50 (Tex.Civ.App.—San Antonio 1938, writ ref'd.).

⁵⁸ *Braun*, 114 S.W.2d, at 949-50.

⁵⁹ See *Fowler v. Tyler I.S.D.*, 232 S.W.3d 335, 339 (Tex. App.—Tyler 2007, pet. denied).

⁶⁰ TEX. ED. CODE, §§ 12.1051 and 12.1052.

⁶¹ TEX. ED. CODE, § 12.1057.

⁶² TEX. ED. CODE § 12.1056.

contracting,⁶³ group health, dental and disability benefits for political subdivisions,⁶⁴ and workers' compensation benefits for political subdivisions.⁶⁵ The members of the governing body of a Texas open-enrollment charter school are considered public officials who must comply with the conflict of interest and nepotism requirements under Texas law for public officials.⁶⁶ Texas open-enrollment charter schools have been deemed political subdivisions who are subject to the Texas Whistleblower Protection Act.⁶⁷

Moreover, in a global sense, the Texas Legislature instructs:

“[A]n open-enrollment charter school is subject to federal and state laws and rules governing public schools and to municipal zoning ordinances governing public schools.”⁶⁸

This provision is set forth with the heading: “General Applicability of Laws, Rules, and Ordinances to Open-Enrollment Charter School.”⁶⁹ The expressed intent is clear and needs no explanation. Texas considers open-enrollment charter schools

⁶³ TEX. ED. CODE § 12.1053.

⁶⁴ TEX. ED. CODE § 12.1058.

⁶⁵ TEX. ED. CODE § 12.1058.

⁶⁶ TEX. ED. CODE § 12.1054.

⁶⁷ See *Pegasus School of Liberal Arts & Sciences v. Ball-Lowder*, 2013 WL 6063834, *5 (Tex. App.—Dallas 2013, pet. denied) (unpublished opinion).

⁶⁸ TEX. ED. CODE, § 12.103(a). Subsection (b) provides an exception for references contained inside the Education Code, where specific reference to their application to open-enrollment charter schools must be expressly stated. Subsection (c) exempts open-enrollment charter schools in small municipalities from compliance with certain zoning ordinances. Read together, all federal and state laws and rules outside of the Texas Education Code which apply to public schools apply equally to open-enrollment charter schools (except for certain municipal zoning ordinances).

⁶⁹ TEX. ED. CODE, § 12.103.

to be public bodies and to be treated the same as any other public school. There is only one other type of public school in Texas: school districts.⁷⁰

In the Secretary of Labor's explanation of the definition of "political subdivision" contained in 29 C.F.R. 1975.5, the Secretary lists examples of entities that are normally regarded as political subdivisions.⁷¹ The example includes: "State, county, and municipal public school boards and commissions."⁷² The NLRB finds state law declarations and interpretations of the public nature of an entity to be worthy of careful consideration.⁷³ In Texas, the state legislature has explicitly declared that open-enrollment charter schools are to be governed by the same federal rules that apply to other public schools.⁷⁴ To the extent the NLRB considers the position of the State of Texas on this issue, the Texas Legislature has spoken quite clearly that it intends open-enrollment charter schools to be treated as public schools under federal law.⁷⁵

Free public education is a governmental function in Texas. Texas open-enrollment charter schools (along with school districts) bear the primary responsibility for implementation of the state's system of constitutionally mandated free public

⁷⁰ See *San Antonio I.S.D. v. McKinney*, 936 S.W.2d 279, 282 (Tex. 1996).

⁷¹ 29 C.F.R. 1975.5.

⁷² *Id.*

⁷³ *NLRB v. Nat. Gas Util. Dist. of Hawkins Cty., Tenn.*, 402 U.S. 600, 602, 91 S.Ct. 1746, 29 L.Ed.2d 206 (1971).

⁷⁴ TEX. ED. CODE, § 12.103.

⁷⁵ *Id.*

education.⁷⁶ Texas open-enrollment charter schools are treated as governmental bodies, with the corresponding rights and responsibilities that go along with such status.

2. The Texas Commissioner of Education has the Power to Remove and/or Appoint Board Members of a Texas Open-Enrollment Charter School.

The Texas Commissioner of Education retains the ability to reconstitute the governing body of a Texas open-enrollment charter school if the Commissioner determines that the charter school:

- (1) committed a material violation of the charter, including failure to satisfy accountability provisions prescribed by the charter;
- (2) failed to satisfy generally accepted accounting standards of fiscal management;
- (3) failed to protect the health, safety, or welfare of the students enrolled at the school;
- (4) failed to comply with [Subchapter D, Chapter 12 of the Texas Education Code] or another applicable law or rule;
- (5) failed to satisfy the performance framework standards adopted under [Texas Education Code] [Section 12.1181](#); or
- (6) is imminently insolvent as determined by the commissioner in accordance with commissioner rule.⁷⁷

As a part of this reconstitution of the governing body, the Texas Legislature has specifically granted the Commissioner the power to remove board members and

⁷⁶ TEX. ED. CODE § 11.002.

⁷⁷ TEX. ED. CODE, §§ 12.115 and 12.116.

appoint board members.⁷⁸ Furthermore, the Commissioner has the power to revoke the charter of the school if it fails for three consecutive years to meet performance standards in either academics or financial accountability.⁷⁹ Texas open-enrollment charter schools report directly to the Texas Commissioner of Education on their academic and financial accountability and are annually required to submit to the Commissioner an independent audit conducted by an outside auditing firm.⁸⁰

The Texas Commissioner of Education has the right and statutory authority to audit a Texas open-enrollment charter school at any time for cause, and at least once a year without cause.⁸¹ This is in addition to the requirement that these schools provide the Commissioner with an annual audit performed by an outside independent auditor.⁸² The Commissioner's audit may include matters directly related to the management or operation of the open-enrollment charter school, including any financial and administrative records.⁸³ In addition to removing and appointing board members of the school, the Commissioner retains power to withhold funding,

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ TEX. ED. CODE, §§ 12.1181; *see also* 19 TEX. ADMIN. CODE § 100.1047.

⁸¹ TEX. ED. CODE, §§ 12.1163

⁸² TEX. ED. CODE, §§ 12.1181; *see also* 19 TEX. ADMIN. CODE § 100.1047.

⁸³ *Id.*

suspend authority to operate, or take any other reasonable action deemed necessary to protect the health, safety and welfare of the students of a school.⁸⁴

Texas open-enrollment charter schools are *controlled* by the Texas Commissioner of Education inasmuch as they report their activities and financial and academic performance to him, and if they fail to meet the Commissioner's standards, the Commissioner may investigate them, sanction them, remove their board and appoint new members, and revoke their charter.

3. The Texas Supreme Court Considers Open-Enrollment Charter Schools to be Institutions, Agencies, or Organs of State Government Deriving Their Status and Authority from the State Constitution or Laws Passed by the Legislature Pursuant to the Constitution.

In 2011, the Texas Supreme Court considered whether an open-enrollment charter school was a “governmental unit,” as that term is defined in the Texas Tort Claims Act, in the case of *LTTS Charter School, Inc. v. C2 Construction, Inc.*⁸⁵ At issue in that case was whether a Texas open-enrollment charter school is an “institution, agency, or organ of government the status and authority of which are derived from the Constitution of Texas or from laws passed by the legislature under the constitution.”⁸⁶ The Court examined Texas open-enrollment charter schools and determined that these schools are “governmental units” under that definition.⁸⁷

⁸⁴ TEX. ED. CODE, §§ 12.1162.

⁸⁵ See *LTTS Charter School, Inc. v. C2 Constr., Inc.*, 342 S.W.3d 73, 269 Ed. Law. Rep. 932 (Tex. 2011).

⁸⁶ *Id.*

⁸⁷ *Id.*, at 77-78.

In arriving at this conclusion, the Texas Supreme Court determined that their status as an “institution, agency, or organ of government” arose from the Texas Education Code, wherein they are described as “created in accordance with the laws of this state and, together with traditional public schools, hav[ing] the primary responsibility for implementing the state’s system of public education.”⁸⁸ As for their authority to be considered an “institution, agency, or organ of government,” the Court found “that too derives from ‘laws passed by the legislature under the constitution,’” citing an Education Code provision which provides that open-enrollment charter schools have “the powers granted to traditional public schools under Title 2 of the Education Code.”⁸⁹

The Texas Supreme Court remanded that case back to the Dallas Court of Appeals for reconsideration of the open-enrollment charter school’s claim of governmental immunity.⁹⁰ Upon remand, the Dallas Court of Appeals found that an open-enrollment charter school is entitled to governmental immunity under a statute that, on its face, applies only to “political subdivisions.”⁹¹

Subsequently, the Dallas Court of Appeals decided in a different case that Texas open-enrollment charter schools are political subdivisions under the Texas

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*, at 82.

⁹¹ *LTTs Charter School, Inc. v. C2 Const., Inc.*, 358 S.W.3d 725, 735-36 (Tex. App.—Dallas, pet. denied).

Whistleblower Protection Act, and thus subject to its terms.⁹² The court of appeals relied heavily on the Texas Supreme Court's decision in *C2 Construction*, writing:

A critical conclusion of the supreme court that directed our decision was that the status of open-enrollment charter schools “as ‘part of the public school system of the state’—and their authority to wield ‘the powers granted to [traditional public] schools’ and to receive and spend state tax dollars (and in many ways to function as a government entity)—derive wholly from the comprehensive statutory regime described above.”⁹³

C. Other Factors Which Can Be Considered.

The Secretary of State will, on occasion, consider factors to determine an entity's status as a political subdivision, but it is not required to do so.⁹⁴ These factors, set forth in 29 C.F.R. § 1975.5, are:

Are the individuals who administer the entity appointed by a public official or elected by the general electorate? What are the terms and conditions of the appointment? Who may dismiss such individuals and under what procedures?

What is the financial source of the salary of these individuals?

Does the entity earn a profit? Are such profits treated as revenue?

How are the entity's functions financed?

What are the powers of the entity and are they usually characteristic of a government rather than a private instrumentality like the power of eminent domain?

How is the entity regarded under State and local law as well as under other Federal laws?

Is the entity exempted from State and local tax laws?

⁹² *Pegasus School of Liberal Arts & Sciences v. Ball-Lowder*, 2013 WL 6063834, *4 (Tex. App.—Dallas, pet. denied).

⁹³ *Id.*

⁹⁴ *Chicago Mathematics and Science Academy Charter School, Inc., Employer, and Chicago Alliance of Charter Teachers and Staff, IFT, AFT, AFL-CIO, Petitioner*, 359 N.L.R.B. 41 (2012), p. 5.

Are the entity's bonds, if any, tax-exempt?

As to the entity's employees, are they regarded like employees of other State and political subdivisions?

What is the financial source of the employee-payroll?

How do employee fringe benefits, rights, obligations, and restrictions of the entity's employees compare to those of the employees of other State and local departments and agencies?

Given this list of questions calling for answers, the response is best shown by answering them individually and specifically.

<p><i>Are the individuals who administer the entity appointed by a public official or elected by the general electorate? What are the terms and conditions of the appointment? Who may dismiss such individuals and under what procedures?</i></p>
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A charter applicant submits a proposal for membership of the governing body of the open-enrollment charter school, including board members and administrators, to the State Board of Education in its charter application. The application includes notarized biographical affidavits from the proposed board members. The State Board of Education weighs the application and determines whether to grant them. They typically grant less than 20% of the applications. The Commissioner of Education has veto power to deny any application, even if the State Board of Education approves it, and has exercised this power in the past.

Once a charter is granted, the entity's board is then governed by its bylaws, which are filed with and approved by the Commissioner of Education. Should the entity fail to meet performance standards set by the Commissioner of Education, the

Commissioner holds the power to remove board members, appoint board members, sanction the school, withhold funding from the school, and revoke its charter.

Universal Academy would point out the United States Supreme Court has ruled that “the Board test is not whether the entity is administered by ‘State-appointed or elected officials.’ Rather, alternative (2) of the test is whether the entity is ‘administered *by individuals who are responsible to public officials* or to the general electorate.”⁹⁵ As annunciated above, Texas open-enrollment charter schools are held strictly responsible to the Texas Commissioner of Education.

What is the financial source of the salary of these individuals?

The board members of a Texas open-enrollment charter school serve without compensation, with the exception that a person employed by the school for school-related services (administration, teaching, etc.) may be compensated for the performance of those duties if the board follows statutory conflict of interest procedures for political officials in determining the compensation of that individual. All salaries paid to school personnel for all positions come from public funds paid to the school by state and federal sources.

Does the entity earn a profit? Are such profits treated as revenue?

Texas open-enrollment charter schools are required to be non-profit entities.⁹⁶

⁹⁵ *Id.* (emphasis in original).

⁹⁶ *See* TEX. ED. CODE, § 12.101.

How are the entity's functions financed?

Through state and federal funding.⁹⁷ Additionally, like school districts, open-enrollment charter schools may also accept private donations. Universal Academy estimates that it receives at least 93% of its funding from the State of Texas under a statutory per-pupil allotment. The remainder consists of federal funds.

What are the powers of the entity and are they usually characteristic of a government rather than a private instrumentality like the power of eminent domain?

Texas open-enrollment charter schools “wield the powers granted to traditional public schools,” according to the Texas Supreme Court.⁹⁸ They are charged, along with school districts, with primary responsibility by the state legislature for implementation of the state’s free public education system under the state constitution.⁹⁹ The State of Texas has always considered the provision of its free public school to be a “purely governmental act” and not in any way a private or proprietary act.¹⁰⁰

How is the entity regarded under State and local law as well as under other Federal laws?

Charter schools are treated as governmental bodies by the state government. The Supreme Court of Texas has deemed a charter school to be an “institution,

⁹⁷ See TEX. ED. CODE, § 12.106.

⁹⁸ *C2 Constr.*, 342 S.W.3d, at 78.

⁹⁹ See TEX. ED. CODE, § 11.002.

¹⁰⁰ *Stout v. Grand Prairie Independent School Dist.*, 733 S.W.2d, at 296; *Braun v. Trustees of Victoria I.S.D.*, 114 S.W.2d 947, 949-50 (Tex.Civ.App.—San Antonio 1938, writ ref’d.).

agency, or organ of government the status and authority of which are derived from the Constitution of Texas or from laws passed by the legislature under the constitution.”¹⁰¹ Under Federal law, charter schools are considered “Local Educational Agencies,” or LEAs, a group which also encompasses school districts. All Federal funds received by Texas open-enrollment charter schools, including approximately 7% of Universal Academy’s annual budget, come to them as LEAs. Under Federal law, LEAs are defined as follows:

The term “local educational agency” means a public board of education or other public authority legally constituted within a State for either administrative control or direction of, or to perform a service function for, public elementary schools or secondary schools in a city, county, township, school district, or other political subdivision of a State, or of or for a combination of school districts or counties that is recognized in a State as an administrative agency for its public elementary schools or secondary schools...

The term includes any other public institution or agency having administrative control and direction of a public elementary school or secondary school.¹⁰²

In fact, in the entire history of open-enrollment charter schools in Texas, every state and federal court decision (which has not been overruled) determining the status of open-enrollment charter schools has found them to be governmental and public bodies:

¹⁰¹ *C2 Const.*, 342 S.W.3d, at 78.

¹⁰² 20 U.S.C.A., §7801(26)(a) and (b)

Are Not Governmental Entities

*Obnesorge v. Winfree Academy Charter School*¹⁰³
(**overruled**)

*Terrell v. Texas Serenity Acad., Inc.*¹⁰⁴
(**overruled**)

Are Governmental Entities

*LTTS Charter School, Inc. v. C2 Constr., Inc.*¹⁰⁵
(**“governmental unit”**)

*Pippins v. Schneider*¹⁰⁶
(**“charter schools are public schools”**)

*Texas Education Agency v. American YouthWorks, Inc.*¹⁰⁷
(**“charter schools are statutorily created public schools”**)

*Texas Education Agency v. Academy of Careers and Technology, Inc.*¹⁰⁸
(are **“public schools”**)

*Metro. Theatre, LLC v. Yes Prep Pub. School, Inc.*¹⁰⁹
(**“governmental unit”**)

¹⁰³ *Obnesorge v. Winfree Academy Charter School*, 328 S.W.3d 654 (Tex. App.—Dallas 2010, no pet.) (*overruled* by *Pegasus School of Liberal Arts & Sciences v. Ball-Lowder*, 2013 WL 6063834 (Tex. App.—Dallas 2013, pet. denied) (unpublished opinion).

¹⁰⁴ *Terrell v. Texas Serenity Acad., Inc.*, 290 S.W.3d 424 (Tex. App.—Houston [14th Dist.] 2009, no pet.) (*overruled* by *LTTS Charter School, Inc. v. C2 Constr., Inc.*, 342 S.W.3d 73 (Tex. 2011).

¹⁰⁵ *LTTS Charter School, Inc. v. C2 Constr., Inc.*, 342 S.W.3d 73 (Tex. 2011) (**“governmental unit”**).

¹⁰⁶ *Pippins v. Schneider*, 2014 WL 108734 (S.D. Tex. 2014), *aff’d sub nom.*, *Robinson v. Schneider*, 614 F. Appx. 222 (5th Cir. 2015) (**“charter schools are public schools”**).

¹⁰⁷ *Tex. Educ. Agency v. American YouthWorks, Inc.*, 496 S.W.3d 244 (Tex. App.—Austin 2016, pet. filed) (**“charter schools are statutorily created public schools”**).

¹⁰⁸ *Tex. Educ. Agency v. Academy of Careers & Technology, Inc.*, 499 S.W.3d 244 (Tex. App.—Austin 2016, no pet.) (are **“public schools”**).

¹⁰⁹ *Metro. Theatre, LLC v. Yes Prep Pub. School, Inc.*, 2016 WL 743590 (Tex. App.—Hous. [1st Dist. Feb. 25, 2016, no pet. hist.) (**“governmental unit”**).

Neighborhood Centers Inc. v. Walker ¹¹⁰
 (“**political subdivision**”)

Rosenberg v. KIPP, Inc. ¹¹¹
 (“**political subdivision**”)

KIPP, Inc. v. Whitehead ¹¹²
 (“**political subdivision**”)

Pegasus School of Liberal Arts & Sciences v. Ball-Lowder ¹¹³
 (“**political subdivision**”)

El Paso Educ. Initiative, Inc. v. Amex Properties ¹¹⁴
 (“**political subdivision**”)

Because the NLRB finds state law declarations and interpretations of the public nature of an entity to be worthy of careful consideration, Universal Academy offers these declarations and interpretations to demonstrate unity among the legislative and judicial branches of Texas in concluding open-enrollment charter schools are public bodies.¹¹⁵

¹¹⁰ *Neighborhood Centers Inc. v. Walker*, 2015 WL 4593436 (Tex. App.—Hous. [1st Dist.] 2015, no pet.) (“**political subdivision**”).

¹¹¹ *Rosenberg v. KIPP, Inc.*, 458 S.W.3d 171 (Tex. App.—Hous. [14th Dist.] 2015, pet. denied) (“**political subdivision**”).

¹¹² *KIPP, Inc. v. Whitehead*, 446 S.W.3d 99 (Tex. App.—Hous. [1st Dist.] 2014, pet. denied) (“**political subdivision**”).

¹¹³ *Pegasus School of Liberal Arts & Sciences v. Ball-Lowder*, 2013 WL 6063834 (Tex. App.—Dallas 2013, pet. denied) (unpublished opinion) (“**political subdivision**”).

¹¹⁴ *El Paso Educ. Initiative, Inc. v. Amex Properties, LLC*, 385 S.W.3d 701 (Tex. App.—El Paso 2012, pet. denied) (“**political subdivision**”).

¹¹⁵ *NLRB v. Nat. Gas Util. Dist. of Hawkins Cty., Tenn.*, 402 U.S. 600, 602, 91 S.Ct. 1746, 29 L.Ed.2d 206 (1971).

Is the entity exempted from State and local tax laws?

Yes. Property purchased or leased by a Texas open-enrollment charter school is considered public property for all purposes.¹¹⁶

Are the entity's bonds, if any, tax-exempt?

Yes. Open-enrollment charter schools may access tax-exempt revenue bonds from the Texas Public Finance Authority Charter School Finance Corporation for the acquisition, construction, repair, or renovation of educational facilities.¹¹⁷ Open-enrollment charter schools that have an investment grade rating and meet certain financial criteria can apply to have their bonds guaranteed by the Permanent School Fund, which results in the bonds being backed by the full, faith, and credit of the State of Texas.¹¹⁸

As to the entity's employees, are they regarded like employees of other State and political subdivisions?

Yes. The employees of Texas open-enrollment charter schools benefit from membership in the Texas Teacher Retirement System in the same manner as the employees of school districts.¹¹⁹ Further, the employees of a Texas open-enrollment

¹¹⁶ See TEX. ED. CODE § 12.128(a)(1).

¹¹⁷ TEX. ED. CODE, § 45.054.

¹¹⁸ TEX. ED. CODE, §§ 45.054 and 53.351.

¹¹⁹ TEX. ED. CODE, § 12.1057.

charter school have the same immunity protections as their counterparts in school districts.¹²⁰

What is the financial source of the employee-payroll?

Texas open-enrollment charter schools pay employees from state and federal funds.

How do employee fringe benefits, rights, obligations, and restrictions of the entity's employees compare to those of the employees of other State and local departments and agencies?

In addition to membership in the Texas Teacher Retirement System and immunity equal to that of school district employees, open-enrollment charter schools provide health insurance to their employees and state-mandated training. The Texas Administrative Code sets forth particular training requirements for board members, chief executive officers, chief administrative officers, campus administrative officers, and business officers.¹²¹ To the extent applicable, employees are governed by Texas laws regarding conflict of interest and nepotism.¹²²

D. This Case is Different and Distinguishable from the Board's Prior Decisions Involving Charter Schools.

In 2002, in *Research Foundation of the City University of New York*, the Board set forth a precedent it would follow in *Chicago Mathematics & Science Academy Charter*

¹²⁰ TEX. ED. CODE, § 12.1056.

¹²¹ 19 TEX. ADMIN. CODE §§ 100.1101, 100.1102, 100.1103, 110.1104, and 100.1105.

¹²² TEX. ED. CODE, §§ 12.1054 and 12.1055.

School, Inc., and *Hyde Leadership Charter School—Brooklyn*.¹²³ In determining a university foundation failed to meet the political subdivision test under the NLRA, the Board highlighted the fact that there was no state law which mandated the authority of a political official to appoint and remove board members.¹²⁴ In *Research Foundation*, the bylaws of the foundation provided a political official with authority to appoint and remove its board members.¹²⁵ But the Board determined this was not enough. There needed to be a statute or some other sort of state law which provided this authority.¹²⁶ Thus, the foundation failed the political subdivision control test.¹²⁷

The Board followed the reasoning of *Research Foundation* ten years later in *Chicago Mathematics* and discussed its holding in some detail.¹²⁸ Noting the conclusion in *Research Foundation* was based upon the absence of a state law providing a political official with removal and appointment power, the Board declared it would examine the charter school under this same standard and determine whether the

selection and removal of the members of an employer's governing board are determined by law, or solely the employer's governing documents.¹²⁹

¹²³ See *Research Foundation of the City University of New York*, 337 NLRB 965, 968 (2002).

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ See *Chicago Mathematics & Science Academy Charter School, Inc.*, 359 NLRB 41, pp. 6-8 (2012).

¹²⁹ *Id.*, at p. 8.

In *Chicago Mathematics*, the Board found not only was there no state law granting a public official appointment and removal power, but the bylaws of the charter school indicated only sitting board members could appoint and remove board members.¹³⁰ There was no public official involved at all. The members were subject to appointment and removal *solely* by private individuals.¹³¹ Accordingly, the Board found the charter school was not a political subdivision.

As support, the Board cited the decision of the National Labor Review Board in *Charter School Administration Services*.¹³² That case did not involve a charter school, but rather a charter management company.¹³³ The Board in *CSAS* found that not only was the board of directors not subject to appointment or removal by a public official, no person involved in running the entity had accountability to any public official.¹³⁴

The Board in *Chicago Mathematics* concluded that the charter school was an “employer” under the NLRA and not a political subdivision. In making this decision, however, the Board was careful to point out that it was confining its decision based

¹³⁰ *Id.*, at p. 9.

¹³¹ *Id.*

¹³² *Id.*; see also *Charter School Administrative Services*, 353 N.L.R.B. 394 (2008).

¹³³ *Id.*, at p. 8.

¹³⁴ *Id.*

on the facts of that case and charter schools in Illinois.¹³⁵ It refused to establish a precedent for charter schools in other states.¹³⁶

We certainly do not establish a bright-line rule that the Board has jurisdiction over entities that operate charter schools, wherever they are located and regardless of the legal framework that governs their specific relationships with state and local governments.¹³⁷

As the Board rightly recognized, each state with charter schools has a unique framework setting forth the role and responsibilities of those schools to their states. Texas has a much more robust charter school system that clearly creates real accountability, control, and responsibility between the Texas Commissioner of Education and Texas open-enrollment charter schools.

Last year, in *Hyde Leadership Charter School—Brooklyn*, the Board applied the same test, citing *Research Foundation* as authority.¹³⁸ The charter agreement provided for removal of a board member by a political official in the narrow circumstance where the member made a material misstatement in a background statement or financial interest disclosure report.¹³⁹ However, and importantly, this removal power by the political official was only contained in the contract for charter and was not contained in any state law.¹⁴⁰ The Charter Schools Act of New York provided no

¹³⁵ *Id.*, at p. 1.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ See *Hyde Leadership Charter School—Brooklyn*, 364 N.L.R.B. 88, pp. 6-7 (2014).

¹³⁹ *Id.*, at p. 7.

¹⁴⁰ *Id.*

authority for any political official to remove and replace board members of charter schools.¹⁴¹ The Board considered this the determinative factor in finding that the charter school did not meet the political subdivision test under the NLRA.¹⁴²

Because the *Hyde Leadership* case represents a recent decision by the Board on whether a charter school is a “political subdivision,” it is important to point out the factors which distinguish the charter school (and New York charter school structure) from the instant case involving a Texas open-enrollment charter school. Primary among these distinctions is the fact that the Texas Legislature, by statute, grants the Texas Commissioner of Education the power to remove and appoint board members of any open-enrollment charter school if the Commissioner determines that the charter school:

- (1) committed a material violation of the charter, including failure to satisfy accountability provisions prescribed by the charter;
- (2) failed to satisfy generally accepted accounting standards of fiscal management;
- (3) failed to protect the health, safety, or welfare of the students enrolled at the school;
- (4) failed to comply with [Subchapter D, Chapter 12 of the Texas Education Code] or another applicable law or rule;
- (5) failed to satisfy the performance framework standards adopted under [Texas Education Code] Section 12.1181; or

¹⁴¹ *Id.*

¹⁴² *Id.*

(6) is imminently insolvent as determined by the commissioner in accordance with commissioner rule.¹⁴³

Texas open-enrollment charter schools pass the control test enunciated by the Board in *Research Foundation* and *Chicago Mathematics*, and applied by the Board most recently in *Hyde Leadership*. In Texas, we have very specific statutes granting this power to the Commissioner.¹⁴⁴ Not only are these entities administered by individuals who are responsible to a political official, the political official has the statutory power to reconstitute their boards.

On the following two pages, additional critical differences which distinguish the recent *Hyde Leadership* case from this present case are set forth in tables.

¹⁴³ TEX. ED. CODE, §§ 12.115 and 12.116.

¹⁴⁴ TEX. ED. CODE, §§ 12.115 and 12.116.

Critical Differences between *Hyde Leadership* and this case

<i>Hyde Leadership</i> (New York)	Texas Charter Schools
<p><u>Not Governmental</u></p> <p>The highest state court determined New York charter schools <i>ARE NOT</i> public entities.¹⁴⁵</p> <p>New York charter schools are not statutorily created to be an arm of the government.¹⁴⁶</p> <p>Charter schools are not created by any New York government entity, special statute, legislation, or public official.¹⁴⁷</p> <p>New York law “does not mandate the establishment of charter schools as a means of fulfilling the state’s obligation to provide public education.”¹⁴⁸</p> <p>Little state or other public official oversight or control.¹⁴⁹</p>	<p><u>Are Governmental</u></p> <p>The highest state court determined Texas charter schools <i>ARE</i> public entities.¹⁵⁰</p> <p>“Statutorily created public schools.”¹⁵¹</p> <p>“[C]harter schools exercise state authority.”¹⁵²</p> <p>Derive their status and authority to operate wholly from a comprehensive statutory framework. Charged with primary responsibility for implementing the state’s system of free public education.¹⁵³</p> <p>Operates under an “educational mandate contained in its governing statutory framework.”¹⁵⁴</p> <p>Texas charter schools are “subject to strict state oversight and control.”¹⁵⁵</p>

¹⁴⁵ *Id.*, at p. 3; see also *New York Charter Schools Ass’n v. Smith*, 15 N.Y.3d 403, 410 (N.Y. 2010).

¹⁴⁶ *Id.*, at p. 5.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*, at 8.

¹⁴⁹ *Id.*, at 5-7.

¹⁵⁰ *LTTS Charter School, Inc.*, 342 S.W.3d, at 77-78 (the Texas Supreme Court is “confident that the Legislature considers Universal Academy to be an institution, agency, or organ of government”).

¹⁵¹ *Tex. Educ. Agency v. American YouthWorks, Inc.*, 496 S.W.3d, at 248.

¹⁵² *Tex. Educ. Agency v. Academy of Careers and Technology, Inc.*, 499 S.W.3d, at 135.

¹⁵³ TEX. ED. CODE §11.002.

¹⁵⁴ *LTTS Charter School, Inc.*, 342 S.W.3d, at 80.

¹⁵⁵ *Tex. Educ. Agency v. Academy of Careers & Technology, Inc.*, 499 S.W.3d, at 136-37.

<i>Hyde Leadership</i> (New York)
<p><u>Not Responsible to a Public Official</u></p> <p>The only control a public official can exercise is to revoke the school's charter for fiscal mismanagement, not meeting student assessment measures, or if the school demonstrates a practice and pattern of egregious and intentional violations of the charter law.¹⁵⁶</p> <p>The governance and control is vested solely with the private incorporators rather than public entities.¹⁵⁷</p> <p>There is no statute authorizing a public official to remove board members. The removal of members was based only on Hyde's own governing documents.¹⁵⁸</p> <p><u>Public School Laws Do Not Apply</u></p> <p>New York charter schools are not subject to state and local rules which apply to other public schools.¹⁵⁹</p> <p><u>Like a Government Contractor</u></p> <p>Nothing really distinguishes New York charter schools from other state contractors.¹⁶⁰</p>

¹⁵⁶ *Hyde Leadership*, 364 N.L.R.B. 88, at p. 4.

¹⁵⁷ *Id.*, at p. 3.

¹⁵⁸ *Id.*, at p. 6.

¹⁵⁹ *Id.*, at p. 1.

¹⁶⁰ *Id.*, at p. 8.

Texas Charter Schools
<p><u>Responsible to a Public Official</u></p> <p>The Texas Commissioner of Education holds statutory power to remove and replace board members of Texas charter schools, and to remove and replace the Superintendent.¹⁶¹</p> <p>Texas charter schools are “subject to strict state oversight and control.”¹⁶²</p> <p>The Texas Legislature has authorized the Commissioner of Education with statutory authority to remove and replace board members of a Texas open-enrollment charter school.¹⁶³</p> <p><u>Public School Laws Do Apply</u></p> <p>Texas charter schools are subject to all federal and state laws and rules which apply to public schools.¹⁶⁴</p> <p><u>Unlike Government Contractors</u></p> <p>Texas charter schools have no property interest or right in their charters.¹⁶⁵</p>

¹⁶¹ TEX. ED. CODE, §§ 12.115 and 12.116; *see also* TEX. ED. CODE, § 39.1121.

¹⁶² *Tex. Educ. Agency v. Academy of Careers & Technology, Inc.*, 499 S.W.3d, at 136-37.

¹⁶³ TEX. ED. CODE, §§ 12.115 and 12.116.

¹⁶⁴ TEX. ED. CODE, § 12.103(a).

¹⁶⁵ *Academy of Careers & Tech.*, 499 S.W.3d, at 136.

E. Universal Academy, as a Texas Open-Enrollment Charter School, is a “Political Subdivision” and is thus Exempted from the Definition of “Employers” over whom this Board has Jurisdiction.

Universal Academy, as an open-enrollment charter school, is directly responsible to, and controlled by, the Texas Commissioner of Education. It issues regularly required reports to the Commissioner.¹⁶⁶ It presents annual, audited financials to the Commissioner.¹⁶⁷ It is rated each year by the Commissioner on its academic and financial performance, receiving grades for both.¹⁶⁸ The Commissioner holds the power to audit the management, academic, and financial records of Universal Academy.¹⁶⁹ The Commissioner may institute these audits at any time for cause, and at least once a year without cause.¹⁷⁰ And, important to the NLRB’s analysis, the Commissioner holds the right and ability to remove and appoint board members of Universal Academy.¹⁷¹

The Supreme Court of the United States has specified that no requirement in law exists for an entity to have its board members appointed by political officials or be elected officials. The Fifth Circuit has held that the political official to whom the entity reports does not need to be involved in day-to-day operation. It is enough that

¹⁶⁶ TEX. ED. CODE, § 12.1181; *see also* 19 TEX. ADMIN. CODE, § 100.1047.

¹⁶⁷ *Id.*

¹⁶⁸ 19 TEX. ADMIN. CODE, § 100.1027.

¹⁶⁹ TEX. ED. CODE, § 12.1163.

¹⁷⁰ *Id.*

¹⁷¹ TEX. ED. CODE, §§ 12.115 and 12.116.

the Texas Commissioner of Education holds the ability to remove and appoint board members of Universal Academy. Universal Academy meets the definition of a “political subdivision” under the NLRA and is, accordingly, not an employer over whom the NLRB has jurisdiction.

II. FIRST AMENDED ANSWER TO THE COMPLAINT

Subject to, and without waiving, the foregoing objection to the jurisdiction of the NLRB over a political subdivision such as Universal Academy, a public open-enrollment charter school in Texas, Universal Academy offers the following first amended answer to the Complaint filed in this matter:

First Unnumbered Paragraph

Universal Academy is not an “employer,” as defined by Section 2(2) of the National Labor Relations Act and the NLRB lacks jurisdiction to bring or consider a Complaint against Universal Academy.

Paragraph 1

Universal Academy reasserts that its employment relationships are beyond the jurisdiction of the NLRB because Universal Academy is a “political subdivision” as that term has been interpreted under the Act. Subject to, and without waiving its objection to jurisdiction, Universal Academy acknowledges and agrees with the dates and times of Charging Party’s filing of a charge in this matter.

Paragraph 2

Universal Academy reasserts that its employment relationships are beyond the jurisdiction of the NLRB because Universal Academy is a “political subdivision” as that term has been interpreted under the Act. Subject to, and without waiving its objection to jurisdiction, Universal Academy vigorously objects to the characterization of its function as “operating a private charter school.” As set forth in the foregoing Section I of this pleading, Universal Academy is a public open-enrollment charter school providing free public education in the State of Texas as guaranteed by the Texas Constitution. Universal Academy acknowledges that it is a nonprofit corporation with an office and place of business in Coppell, Texas.

Paragraph 3(a)

Universal Academy reasserts that its employment relationships are beyond the jurisdiction of the NLRB because Universal Academy is a “political subdivision” as that term has been interpreted under the Act. Subject to, and without waiving its objection to jurisdiction, Universal Academy acknowledges that its gross revenues exceeded \$1,000,000 during the fiscal year ending August 31, 2015. However, Universal Academy would point out again that it is a nonprofit corporation and it received these funds from the State of Texas to hold in trust for the education of public school students.

Paragraph 3(b)

Universal Academy reasserts that its employment relationships are beyond the jurisdiction of the NLRB because Universal Academy is a “political subdivision” as that term has been interpreted under the Act. Subject to, and without waiving its objection to jurisdiction, Universal Academy agrees that in fiscal year 2015 it purchased and received products, goods and materials valued in excess of \$5,000 from points outside of Texas.

Paragraph 4

Universal Academy reasserts that its employment relationships are beyond the jurisdiction of the NLRB because Universal Academy is a “political subdivision” as that term has been interpreted under the Act. Subject to, and without waiving its objection to jurisdiction, Universal Academy denies that it is an “employer” under Section 2(2) of the Act because that provision explicitly provides that “political subdivisions” shall not be considered as employers under that definition. As set forth in the foregoing Section I of this pleading, Universal Academy fits within the definition of a “political subdivision” which is outside the jurisdiction of the NLRB.

Paragraph 5

Universal Academy reasserts that its employment relationships are beyond the jurisdiction of the NLRB because Universal Academy is a “political subdivision” as that term has been interpreted under the Act. Subject to, and without waiving its objection to jurisdiction, Universal Academy admits that Diane Moshier and Janice

Blackmon were supervisors over Ms. Free, per the definition of “Supervisor” in Section 2 (11) of the Act, and acted as agents of Universal Academy, per the definition of “Agent” in Section 2 (13) of the Act. Universal Academy denies that Sanae Stroud was a supervisor as to Ms. Free, per the definition of “Supervisor” in Section 2 (11) of the Act, and deny that Ms. Stroud had agency authority with regard to Ms. Free such that she was an “Agent,” per the definition of “Agent” in Section 2 (13) of the Act. Otherwise, the Complaint correctly states the title that each person held at the time of the events giving rise to this Complaint.

Paragraph 6

Universal Academy reasserts that its employment relationships are beyond the jurisdiction of the NLRB because Universal Academy is a “political subdivision” as that term has been interpreted under the Act. Subject to, and without waiving its objection to jurisdiction, Universal Academy admits that this provision is contained within employment contracts, as it pertains to preventing employees from using or disseminating confidential student records outside of the school grounds, but denies that it impedes any other fraternization among employees.

Paragraph 7

Universal Academy reasserts that its employment relationships are beyond the jurisdiction of the NLRB because Universal Academy is a “political subdivision” as that term has been interpreted under the Act. Subject to, and without waiving its objection to jurisdiction, Universal Academy admits that it maintains this policy in its

contracts to comply with state laws limiting the access of persons not employed by the school. All non-employees of the school are required by state law to receive prior approval before entering school property for reasons of safety. It further is intended to prevent the dissemination of confidential student information to non-employees.

Paragraph 8(a)

Universal Academy reasserts that its employment relationships are beyond the jurisdiction of the NLRB because Universal Academy is a “political subdivision” as that term has been interpreted under the Act. Subject to, and without waiving its objection to jurisdiction, Universal Academy denies the allegations in paragraph 8(a). Universal Academy specifically denies that Ms. Free raised “employee concerns” at the meeting in question, and Universal Academy also specifically denies that Ms. Free “concertedly complained to Respondent regarding the wages, hours, and working conditions of Respondent’s employees.” The factual recitation in paragraph 8(a) is inaccurate and Ms. Free’s comments at the meeting were not made on behalf of anyone other than Ms. Free, who asked questions about a school program with which she was no longer involved. Ms. Free directed personal derision in an attack upon Ms. Stroud because of a prior personal conflict she had with Ms. Stroud. Ms. Free engaged in an apparent attempt to intimidate and embarrass Ms. Stroud for personal reasons. Ms. Free neither made concerted complaints at that meeting regarding wages, hours, and working conditions of other employees nor raised any employee concerns.

Paragraph 8(b)

Universal Academy reasserts that its employment relationships are beyond the jurisdiction of the NLRB because Universal Academy is a “political subdivision” as that term has been interpreted under the Act. Subject to, and without waiving its objection to jurisdiction, Universal Academy denies the allegations in paragraph 8(b) and demands strict proof thereof. Universal Academy specifically denies that Ms. Blackmon “threatened an employee with discharge because the employee engaged in the protected activity.” This factual recitation is inaccurate and Ms. Free did not engage in any protected concerted activity.

Paragraph 8(c)

Universal Academy reasserts that its employment relationships are beyond the jurisdiction of the NLRB because Universal Academy is a “political subdivision” as that term has been interpreted under the Act. Subject to, and without waiving its objection to jurisdiction, Universal Academy denies the allegations in paragraph 8(c) and specifically denies that Ms. Free was “discharged.” Ms. Free tendered a handwritten resignation to Universal Academy.

Paragraph 8(d)

Universal Academy reasserts that its employment relationships are beyond the jurisdiction of the NLRB because Universal Academy is a “political subdivision” as that term has been interpreted under the Act. Subject to, and without waiving its objection to jurisdiction, Universal Academy denies the allegations in paragraph 8(d)

and incorporates its answers to Paragraphs 8(a) and 8(d) and specifically denies that Ms. Free engaged in any protected concerted activity and specifically denies that Ms. Free was discharged by Universal Academy.

Paragraph 9

Universal Academy reasserts that its employment relationships are beyond the jurisdiction of the NLRB because Universal Academy is a “political subdivision” as that term has been interpreted under the Act. Subject to, and without waiving its objection to jurisdiction, Universal Academy denies the allegations in paragraph 9 and specifically denies it has interfered with, restrained, or coerced employees in the exercise of any rights they hold. Because Paragraph 9 of the Complaint references Paragraphs 6 through 8 of the Complaint, Respondent incorporates its Answers to Paragraphs 6 through 8 of the Complaint as if set forth fully in this response to Paragraph 9.

Paragraph 10

Universal Academy reasserts that its employment relationships are beyond the jurisdiction of the NLRB because Universal Academy is a “political subdivision” as that term has been interpreted under the Act. Subject to, and without waiving its objection to jurisdiction, Universal Academy denies the allegations in paragraph 10 and specifically denies that it engaged in any unfair labor practices or is otherwise subject to the Act.

Paragraph 11

Universal Academy reasserts that its employment relationships are beyond the jurisdiction of the NLRB because Universal Academy is a “political subdivision” as that term has been interpreted under the Act. Subject to, and without waiving its objection to jurisdiction, Universal Academy denies the allegations in paragraph 11 and specifically denies that it has engaged in unfair labor practices or is otherwise subject to the Act. Universal Academy also specifically denies that a “remedy” is necessary because of any alleged act of Universal Academy and specifically denies that Charging Party has been damaged.

PRAYER

For the foregoing reasons, Universal Academy prays that the Board dismiss the charge against Universal Academy for lack of jurisdiction. Subject to, and without waiving, this objection to jurisdiction, Universal Academy prays that the Board render a decision in its favor in this matter and dismiss all claims against it.

Respectfully submitted,

THE FULLER LAW GROUP, PLLC

COUNSEL FOR
RESPONDENT

By:



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CERTIFICATE OF SERVICE

On May 1, 2017, a true and correct copy of the foregoing document was electronically filed with the NLRB in this matter and served via electronic mail on all counsel of record as listed below:

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